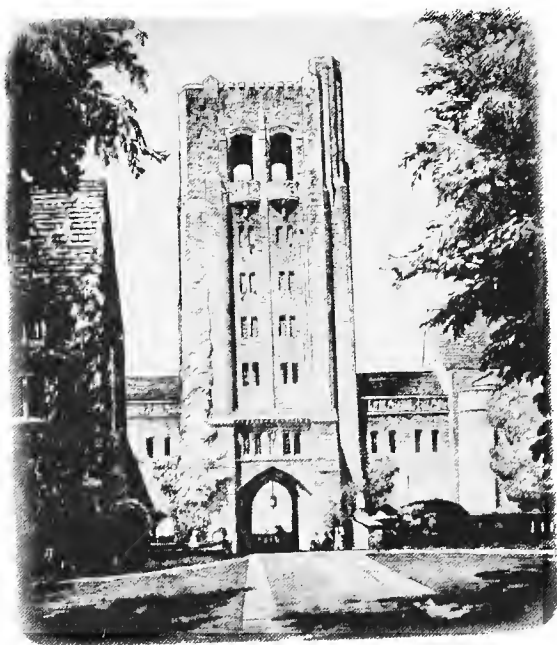




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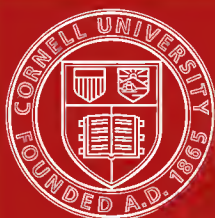
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BILLS OF LADING

HEARINGS

BEFORE THE COMMITTEE ON INTERSTATE
COMMERCE OF THE UNITED STATES SENATE
SIXTY-SECOND CONGRESS, ON S. 4713, A BILL
RELATING TO BILLS OF LADING IN COM-
MERCE WITH FOREIGN NATIONS AND AMONG
THE SEVERAL STATES, AND S. 957, A BILL
RELATING TO BILLS OF LADING, FEBRUARY
16 AND 17, MARCH 1, 2, AND 15
AND APRIL 26, 1912



PRESENTED BY MR. CLAPP
MAY 8, 1912.—Ordered to be printed

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THE GIFT OF

Hon. Elihu Root
Washington, D.C.

Date,

Oct. 8, 1912.

62D CONGRESS }
2d Session }

SENATE



BILLS OF LADING

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BILLS OF LADING.

FRIDAY, FEBRUARY 16, 1912.

COMMITTEE ON INTERSTATE COMMERCE,
UNITED STATES SENATE,
Washington, D. C.

The committee met at 11.30 o'clock a. m.

Present: Senators Clapp (chairman), Crane, Cummins, Brandegee, Oliver, Tillman, Newlands, and Pomerene.

The committee had under consideration the bills S. 957 and S. 4713, as follows:

[S. 957, Sixty-second Congress, first session.]

A BILL Relating to bills of lading.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

ORDER BILL OF LADING DEFINED.

That whenever any common carrier, railroad, or transportation company (hereinafter termed "carrier") shall issue a bill of lading for the transportation of property from a place in one State to a place in another State (the word "State" to include any Territory or District of the United States), which bill shall be, or purport to be, drawn to the order of the shipper or other specified person, or which shall contain any statement or representation that the property described therein is or may be deliverable upon the order of any person therein mentioned, such bill shall be known as an "order bill of lading" and shall conform to the following requirements:

(a) In connection with the name of the person to whose order the property is deliverable the words "order of" shall prominently appear in print on the face of the bill, thus: "Consigned to order of ———."

(b) It shall contain on its face the following provision: "The surrender of this original order bill of lading, properly indorsed, shall be required before delivery of the property."

(c) It shall not contain the words "Not negotiable" or words of similar import. If such words are placed on an order bill of lading, they shall be void and of no effect.

(d) Nothing herein shall be construed to prohibit the insertion in an order bill of lading of other terms or conditions not inconsistent with the provisions of this act or otherwise contrary to law or public policy.

STRAIGHT BILL OF LADING DEFINED.

SEC. 2. That whenever a bill of lading is issued by a carrier for the transportation of property from a place in one State to a place in another, in which the property described therein is stated to be consigned or deliverable to a specified person, without any statement or representation that such property is consigned or deliverable to the order of any person, such bill shall be known as a "straight bill of lading" and shall contain the following requirements:

(a) The bill shall have prominently stamped upon its face the words "Not negotiable."

(b) Nothing herein shall be construed to prohibit the insertion in a straight bill of lading of other terms or conditions not inconsistent with the provisions of this act or otherwise contrary to law or public policy.

SEC. 3. That a carrier shall be liable to any person injured thereby for the damage caused by the failure to comply with any of the provisions of sections one and two hereof. But an order or a straight bill of lading, notwithstanding such noncompliance, shall be within the provisions of this act.

SEC. 4. That every carrier who himself, or by his officer, agent, or servant authorized to issue bills of lading, shall issue an order bill of lading or a straight bill of lading, as defined by this act, before the whole of the property as described therein shall have been actually received and is at the time under the actual control of such carrier to be transported, or who shall issue a second or duplicate order bill of lading or straight bill of lading for the same property, in whole or in part, for which a former bill of lading has been issued and remains outstanding and uncanceled, without prominently marking across the face of the same the word "Duplicate," shall be estopped, as against the consignee and every other person who shall acquire any such bill of lading in good faith and for value, to deny the receipt of the property as described therein, or to assert that a former bill of lading has been issued and remains outstanding and uncanceled for the same property, as the case may be; and such issuing carrier shall be liable to the consignee named in a straight bill, or to the holder of an order bill who has given value in good faith relying on the description therein of the property for damages caused by the nonreceipt by the carrier of all or part of the property, or its failure to correspond with the description thereof in the bill at the time of its issue, or for the failure to mark the word "Duplicate" upon a second or duplicate bill as indicated above: *Provided*, That where an order or a straight bill of lading is issued for property billed "shipper's load and count," indicating that the goods were loaded by the shipper and the description of them made by him; and if such statement be true the carrier shall not be liable for the nonreceipt or by the misdescription of the goods described in the bill, in which event the estoppel and liability above provided shall not attach.

SEC. 5. That every carrier, or officer, agent, or servant of a carrier, who shall deliver the property described in an order bill of lading without requiring surrender and making cancellation of such bill, or, in case of partial delivery, indorsing thereon a statement of the property delivered, shall be estopped, as against all and every person or persons who have acquired, or who thereafter shall acquire, in good faith and for value, any such order bill of lading, from asserting that the property as described therein has been delivered or partially delivered; and such carrier shall be liable to every and any such person for the damages which he or they may have sustained because of reliance upon such bill.

SEC. 6. That no carrier shall be liable under the provisions of this act where the property is replevied, or removed from the possession of the carrier by other legal process, or has been lawfully sold to satisfy the carrier's lien, or in case of sale or disposition of perishable, hazardous, or unclaimed goods, in accordance with law or the terms of the bill of lading.

SEC. 7. That any alteration, addition, or erasure in a bill of lading after its issue without authority from the carrier issuing the same, either in writing or noted on the bill of lading, shall be void, but such bill of lading shall be enforceable according to its original tenor.

[S. 4713, Sixty-second Congress, second session.]

A BILL Relating to bills of lading in commerce with foreign nations and among the several States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That bills of lading issued by any common carrier for the transportation of goods from a place in a State to a place in a foreign country or from a place in one State to a place in another State shall be governed by this act.

SEC. 2. That every bill must embody within its written or printed terms—

- (a) The date of its issue;
- (b) The name of the person from whom the goods have been received;
- (c) The place where the goods have been received;
- (d) The place to which the goods are to be transported;
- (e) A statement whether the goods received will be delivered to a specified person or to the order of a specified person;
- (f) A description of the goods or of the packages containing them, which may, however, be in such general terms as are referred to in section twenty-three; and
- (g) The signature of the carrier.

A negotiable bill shall have the words "order of" printed thereon immediately before the name of the person upon whose order the goods received are deliverable.

A carrier shall be liable to any person injured thereby for the damage caused by the omission from a negotiable bill of any of the provisions required in this section.

SEC. 3. That a carrier may insert in a bill issued by him any other terms and conditions: *Provided*, That such terms and conditions shall not—

(a) Be contrary to law or public policy; or

(b) In anywise impair his obligation to exercise at least that degree of care in the transportation and safekeeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

SEC. 4. That a bill in which it is stated that the goods are consigned or destined to a specified person is a nonnegotiable or straight bill.

SEC. 5. That a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is a negotiable or order bill. Any provision in such a bill that it is nonnegotiable shall not affect its negotiability within the meaning of this act.

SEC. 6. That negotiable bills issued in a State for the transportation of goods to any place in the United States on the Continent of North America, except Alaska and Panama, shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to anyone who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts: *Provided, however*, That nothing contained in this section shall be interpreted or construed to forbid the issuing of negotiable bills in parts or sets for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries, or to impose the liabilities set forth in this section for so doing.

SEC. 7. That when more than one negotiable bill is issued in a State for the same goods to be transported to any place in the United States on the Continent of North America, except Alaska and Panama, the word "duplicate," or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill: *Provided, however*, That nothing contained in this section shall in such case for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries be interpreted or construed so as to require the placing of the word "duplicate" thereon, or to impose the liabilities set forth in this section for failure so to do.

SEC. 8. That a nonnegotiable bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgments of an informal character.

SEC. 9. That the insertion in a negotiable bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

SEC. 10. That except as otherwise provided in this act, where a consignor receives a bill and makes no objection to its terms or conditions at the time he receives it, neither the consignor, nor any person who accepts delivery of the goods, nor any person who seeks to enforce any provisions of the bill, shall be allowed to deny that he is bound by such terms and conditions so far as they are not contrary to law or public policy.

SEC. 11. That a carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods, or, if the bill is negotiable, by the holder thereof, if such a demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(b) An offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is negotiable; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.

SEC. 12. That a carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a nonnegotiable bill for the goods, or

(c) A person in possession of a negotiable bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.

SEC. 13. That where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property

or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

A request for information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

SEC. 14. That except as provided in section twenty-seven, and except when compelled by legal process, if a carrier delivers goods for which a negotiable bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto.

SEC. 15. That except as provided in section twenty-seven, and except when compelled by legal process, if a carrier delivers part of the goods for which a negotiable bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered, with a description, which may be in general terms, either of the goods or packages that have been so delivered, or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

SEC. 16. That any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

SEC. 17. That where a negotiable bill has been lost or destroyed a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction; and upon the giving of a bond, with sufficient surety to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill remaining outstanding, the court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees.

The delivery of the goods under an order of the court as provided in this section shall not relieve the carrier from liability to a person to whom the negotiable bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

SEC. 18. That a bill upon the face of which the word "duplicate" or some other word or words, indicating that the document is not an original bill, is placed plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.

SEC. 19. That no title to goods or right to their possession, asserted by a carrier for his own benefit, shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.

SEC. 20. That if more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods, or as an original suit, whichever is appropriate.

SEC. 21. That if some one other than the consignee or the person in possession of the bill has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods either to the consignee or person in possession of the bill or to the adverse claimant until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

SEC. 22. That except as provided in the two preceding sections and in section twelve no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a nonnegotiable bill or by the holder of a negotiable bill against the carrier for failure to deliver the goods on demand.

SEC. 23. That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to (a) the consignee named in a nonnegotiable bill or (b) the holder of a negotiable bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier or a connecting carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

If, however, the goods are described in a bill merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill, such statements, if true, shall not make liable the carrier issuing the bill, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also, by inserting in the bill the words "shipper's load and count" or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill.

SEC. 24. That if goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and a negotiable bill is issued for them, they can not thereafter, while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.

SEC. 25. That a creditor whose debtor is the owner of a negotiable bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which can not readily be attached or levied upon by ordinary legal process.

SEC. 26. That if a negotiable bill is issued the carrier shall have no lien on the goods therein mentioned except for charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.

SEC. 27. That after goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be negotiable.

SEC. 28. That a negotiable bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank.

SEC. 29. That a negotiable bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.

SEC. 30. That a bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A nonnegotiable bill can not be negotiated, and the indorsement of such a bill gives the transferee no additional right.

SEC. 31. That a negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.

SEC. 32. That a person to whom a negotiable bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

SEC. 33. That a person to whom a bill has been transferred but not negotiated acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is nonnegotiable, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a nonnegotiable bill the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified, and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods.

SEC. 34. That where a negotiable bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

SEC. 35. That a person who negotiates or transfers for value a bill by indorsement or delivery, including one who assigns for value a claim secured by a bill, unless a contrary intention appears, warrants—

(a) That the bill is genuine.

(b) That he has a legal right to transfer it.

(c) That he has knowledge of no fact which would impair the validity or worth of the bill

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a bill the goods represented thereby.

In the case of an assignment of a claim secured by a bill the liability of the assignor shall not exceed the amount of the claim.

SEC. 36. That the indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

SEC. 37. That a mortgagee or pledgee, or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described.

SEC. 38. That the validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor, in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, or conversion.

SEC. 39. That where a person, having sold, mortgaged, or pledged goods which are in a carrier's possession and for which a negotiable bill has been issued, or having sold, mortgaged, or pledged the negotiable bill representing such goods, continues in possession of the negotiable bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

SEC. 40. That where goods are shipped by the consignor in accordance with a contract or order for their purchase, the form in which the bill is taken by the consignor shall indicate the transfer or retention of the property or right to the possession of the goods, as follows:

(a) Where by the bill the goods are deliverable to the buyer or to his agent, or to the order of the buyer or of his agent, the consignor thereby transfers the property in the goods to the buyer.

(b) Where by the bill the goods are deliverable to the seller or to his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(c) Where by the bill the goods are deliverable to the order of the buyer or of his agent, but possession of the bill is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

(d) Where the seller draws on the buyer for the price and transmits the draft and bill together to the buyer to secure acceptance or payment of the draft, the buyer is bound to return the bill if he does not honor the draft, and if he wrongfully retains the bill he acquires no added right thereby. If however, the bill provides that the goods are deliverable to the buyer, or to the order of the buyer, or is indorsed in blank or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill or goods from the buyer shall obtain the title to the goods, although the draft has not been honored, if such purchaser has received delivery of the bill, indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

SEC. 41. That where the seller of goods draws on the buyer for the price of the goods and transmits the draft and a bill of lading for the goods, whether directly to the buyer or through a bank or other agency, unless a different intention on the part of the seller appears, the buyer and all other parties interested shall be justified in assuming—

(a) If the draft is by its terms or legal effect payable on demand, or presentation, or at sight, or not more than three days thereafter (whether such three days be termed days of grace or not), that the seller intended to require payment of the draft before the buyer should be entitled to receive or retain the bill.

(b) If the draft is by its terms payable on time, extending beyond three days after demand, presentation, or sight (whether such three days be termed days of grace or not), that the seller intended to require acceptance, but not payment, of the draft before the buyer should be entitled to receive or retain the bill.

The provisions of this section are applicable whether by the terms of the bill the goods are consigned to the seller or to his order, or to the buyer or to his order, or to a third person or to his order.

SEC. 42. That where a negotiable bill has been issued for goods no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

SEC. 43. That, except as provided in section forty-two, nothing in this act shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this act, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them.

SEC. 44. That any officer, agent, or servant of a carrier who, with intent to defraud, issues or aids in issuing a bill knowing that all or any part of the goods for which such bill is issued have not been received by such carrier, or by an agent of such carrier, or by a connecting carrier, or are not under the carrier's control at the time of issuing such bill, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

SEC. 45. That any officer, agent, or servant of a carrier who, with intent to defraud, issues or aids in issuing a bill for goods knowing that it contains any false statement, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

SEC. 46. That any officer, agent, or servant of a carrier who, with intent to defraud, issues or aids in issuing a duplicate or additional negotiable bill for goods in violation of the provisions of section seven, knowing that a former negotiable bill for the same goods, or any part of them, is outstanding and uncanceled, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

SEC. 47. That any person who ships goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable bill which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

SEC. 48. That any person who with intent to deceive negotiates or transfers for value a bill, knowing that any or all of the goods which by the terms of such bill appear to have been received for transportation by the carrier which issued the bill are not in the possession or control of such carrier or of a connecting carrier, without disclosing this fact, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

SEC. 49. That any person who with intent to defraud secures the issue by a carrier of a bill, knowing that at the time of such issue any or all of the goods described in such bill as received for transportation have not been received by such carrier or an agent of such carrier or a connecting carrier or are not under the carrier's control, by inducing an officer, agent, or servant of such carrier falsely to believe that such goods have been received by such carrier or are under its control, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

SEC. 50. That any person who with intent to defraud issues or aids in issuing a nonnegotiable bill without the words "not negotiable" placed plainly upon the face thereof shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

SEC. 51. That in any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

SEC. 52. That this act shall as far as practicable be interpreted and construed in harmony with the law of those States which enact an act of similar import to make uniform the laws of the various States on bills of lading.

SEC. 53. (First) That in this act, unless the context or subject matter otherwise requires—

"Action" includes counterclaim, set-off, and suit in equity.

"Bill" means bill of lading governed by this act.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation, or which have been or are about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee and to take as pledgee.

"Purchaser" includes mortgagee and pledgee.

"State" includes any Territory, District, insular possession, or isthmian possession.

"Value" is any consideration sufficient to support a simple contract. An antecedent or preexisting obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor.

(Second) A thing is done "in good faith" within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

SEC. 54. That the provisions of this act do not apply to bills made and delivered prior to the taking effect thereof.

SEC. 55. That this act shall take effect on the first day of January, one thousand nine hundred and thirteen.

Senator POMERENE. Before going into this subject, Mr. Chairman, I desire to say that I introduced a bill the other day on this subject which has been approved by the committee on uniform legislation of the State bar association and shippers' association. I was going to suggest that I did not know that this matter was to be taken up to-day. I have one or two gentlemen whom I would like to have invited to appear before the committee when it comes to a consideration of the matter.

The CHAIRMAN. They may appear later.

STATEMENT OF SAMUEL WILLISTON, LAWYER, AND PROFESSOR OF LAW IN HARVARD UNIVERSITY, REPRESENTING PRIMARILY THE AMERICAN BANKERS' ASSOCIATION.

Mr. WILLISTON. Mr. Chairman, and gentlemen of the committee, I represent primarily the American Bankers' Association, but act also in concert with a number of mercantile associations, members of some of which are here present, and I should like to read, for the purposes of the record, the names of the associations which recommended this bill, Senate bill 957, before the House of Representatives when the same bill was pending, as the Stevens bill, before the House, namely:

The New York Cotton Exchange, the New York Board of Trade and Transportation, the American Warehousemen's Association, the New York Mercantile Exchange, the Galveston Cotton Exchange and Board of Trade, the New York Produce Exchange, the National Wholesale Grocers' Association, the National Poultry Association, the Merchants' Association, the New York State Bankers' Association, the Michigan Bankers' Association, the New Jersey Bankers' Association, the National League of Commission Merchants, and the National Board of Trade.

I was asked by the American Bankers' Association to become an advocate of this measure, and, in part, to draw it, because I had been the draftsman of the State bill which has been presented by Senator Pomerene. I am therefore familiar with that bill, and I am familiar with the discussions out of which it arose and the conferences of the various persons interested, which led up to its final recommendation by the conference of commissioners for uniform State laws.

I would like to say in regard to that bill that Senate bill 957 contains nothing at variance with the more elaborate bill which has been presented by Senator Pomerene. It contains certain matters that were deemed most vital in the State bill, so far as congressional action is concerned, but the parties whom I represent would not be displeased to see instead of Senate bill 957 the other Senate bill, in so far as it may be thought that all of the provisions of that bill are constitutional for national legislation. I confess that as to part of them I have some doubt. But what the people whom I represent do desire to see is a legislative reform in regard to certain specific evils that have arisen in regard to bills of lading.

Bills of lading are used to an enormous extent in the commerce of the country, not only as a basis for loans, but as a basis of purchase and sale and as a basis for sending goods forward on commission. The great staple crops of the country are moved by means of bills of lading. They could not otherwise be easily moved. There are three sorts of difficulties that arise in regard to bills of lading. I say this

because I have found some confusion in the minds of gentlemen in regard to this point. The first sort of evil is in regard to the contract between the shipper and the carrier and depends upon the form of the bill of lading.

Now, that evil has been practically eliminated by the uniform bill of lading that has been recommended by the commerce commission. We are not dealing with that matter in the bill before us. There is a second sort of evil that arises in regard to the purchase by outsiders, neither of whom is the carrier of bills of lading or from the lending of money on them. For instance, I have a bill of lading and I borrow money on it. Now, neither I nor the person from whom I borrow is a carrier. Now, one part of the bill recommended by the Commissioners of Uniform State Laws applies to that sort of difficulty, and they are very important difficulties, but we have not felt sure that it was within the scope of Congress to cover that sort of difficulty.

But there is a third kind of difficulty, and it is at difficulties of that sort that Senate bill 957 is aimed. This difficulty is that some other party than the shipper gets into a dispute with the carrier. This other party may be either the consignee of the bill or he may be a purchaser of the bill, but one party to the dispute is a carrier, and that fact makes it clear, I think, that it is a regulation of commerce to provide for the protection of the consignees and purchasers of bills in this sort of case.

This bill, S. 957, is something that the parties whom I represent have been urging for some time. It passed the House of Representatives in the last Congress as the Stevens bill. We had a hearing before the Senate committee then on that bill, but the time was very brief, the session was nearly over, as I remember it, and nothing could be done then. The bill has now been again introduced, but it should be remembered that it has the prestige of a favorable report by the House committee and a passage by the House of Representatives at the last session of Congress.

The bill in substance provides for three things; first, it aims to make carriers liable on interstate bills, even if they have not received the goods. That is the most important provision. It makes carriers liable to consignees of any bill, order or straight, and to purchasers of order bills.

The second important thing that the bill aims to do is to make carriers liable on order bills which they leave outstanding after delivering all or part of the goods. Carriers are also required to mark bills as duplicates, if they are duplicates, and are made liable if they issue, without so marking them, more than one bill for the same shipment. There is also a provision in regard to alteration and a few provisions as to the form of the bill. But the vital question on which discussion has always centered in the past in regard to this bill, and the question, I suppose, on which the chief contention is bound to arise now, is in regard to the proposition of the bill to make the carrier liable even if he does not receive the goods for bills of lading which have been issued by one of the agents of the railroad authorized to issue bills of lading.

The law laid down by the Supreme Court of the United States, following an early English case, is that under these circumstances a carrier can say that the agent who issued that bill had no authority to issue a bill of lading unless he had received the goods. I venture to say, in spite of the authority of the Supreme Court of the United

States, that it seems to me that that was a mistaken view. I should not venture to say that if there were not the authority of many State courts in support of the contrary opinion; if it were not true that on the continent of Europe, where the same sort of question occurs, the law is uniform that the carrier is liable. But the Supreme Court of the United States, and a majority of the States which have decided the question, do hold the carrier harmless, and we seek to hold the carrier liable. We say that there is no more reason why a carrier should not be responsible for the act of his agent in this particular than why any man should not be responsible for the act of his agent in the course of his business, and especially is this true because of the way these bills are generally issued. These bills, which may be called false, or fictitious bills, are issued in two ways, as a matter of fact. They are issued, first, as a pure fraud out and out. The railroad agent, generally in conspiracy with a fraudulent shipper, issues one of these bills on which the fraudulent shipper gets money, which he may or may not divide with the railroad agent. That is one kind of a case, but that is not the common case. The common case of false or fictitious bills involves what we call accommodation bills. The railroad agent issues the bill of lading for a shipment of goods that the shipper intends to ship, and the railroad agent expects to receive, but the bill of lading is issued beforehand in order to oblige or to accommodate the shipper. That sort of thing is done by railroads to get business, and though we are unable to prove in any particular case that the railroad agent is authorized to do it, we do see in many cases railroad agents who have done it keep their jobs.

Now, certainly while that sort of thing goes on unchecked, there is every reason for holding the railroad liable.

This is no new thing—this proposed legislation. The thing that has seemed to us evil has seemed to others evil, and especially I would like to refer to the act of the Commissioners on Uniform State Laws. They are an entirely impartial body of persons, and at the time I acted as draftsman for them I had no retainer from any interests to draw the bill one way rather than another. I have got my retainer for this bill because of my views, which are expressed in the other bill—in the State bill; and even if I had been prejudiced one way or another in the drafting of the State bill, the commissioners from several States who presented that bill were no mere dummies. They were able lawyers, with opinions of their own. Numerous conferences were held in which the views of railroad attorneys, as well as everybody else, were sought and asked, and the result is the bill which, after four or five years of consideration, was presented, and which does impose upon the railroads the sort of liability that we seek in Senate bill 957.

This State bill has already been passed in nine States, including some of the great commercial States of the country—Connecticut, Illinois, Iowa, Massachusetts, Maryland, Michigan, New York, Ohio, and Pennsylvania. This State bill, however, is not the only attempt which States have made to remedy the same evils which we seek to remedy by the bill now under consideration. In States which originate shipments, as well as in States which receive shipments, the same effort has been made.

In Alabama, for instance, and Louisiana in the South, where shipments originate, in Missouri, Pennsylvania, Washington, Minnesota, the same sort of legislation has been attempted.

The State legislation on the subject is open to one great disadvantage. A State necessarily only has power to enact rules in regard to bills which are issued in that State. Accordingly, when New York passes or Ohio passes, as each of the States has passed, the bill presented before you by Senator Pomerene, that State law can only govern bills of lading issued in New York or in Ohio, respectively. And as a great quantity of the bills dealt with in New York City have been issued all over the country, that State law in New York is valuable, but not nearly so valuable as it ought to be. Therefore, we need a law which shall cover the whole United States and cover interstate and foreign bills.

Now, in regard to the practical cases that come up, the practical situations which make it necessary for us to seek this legislation, there are other gentlemen present who are engaged in mercantile and in the banking business who are much more familiar with the practical applications of the matter than I am whom I should like to ask to address the committee briefly.

The CHAIRMAN. Just a minute. Senator Brandegee, do you desire to make any inquiries?

Senator BRANDEGEE. What was the case in the Supreme Court that you alluded to?

Mr. WILLISTON. It is called the Friedlander case—*Friedlander v. Texas & Pacific Railroad Co.* (130 U. S., 416), decided in the year 1888.

There are other cases to the same effect, and the majority of the committee of the House of Representatives in its report summed up the matter as to the existing law as follows:

The common-law rule has been followed by the Supreme Court of the United States and by the courts of Massachusetts, Ohio, Louisiana, Minnesota, Maryland, Alabama, Arkansas, Mississippi, and Washington.

Senator BRANDEGEE. Will you make that report a part of your remarks so that it may appear in the record?

Mr. WILLISTON. I will.

Senator BRANDEGEE. What committee was it from?

Mr. WILLISTON. It was the Committee on Interstate and Foreign Commerce.

Senator BRANDEGEE. What is the date of that report?

Mr. WILLISTON. June 1, 1910.

Senator BRANDEGEE. Do they discuss there the question of whether the regulation of bills of lading is a regulation of commerce, or is that admitted? I do not mean in that case, but I mean in the report that you have. Do they discuss that question or is it not in question?

Mr. WILLISTON. They did not discuss it at length, certainly. The minority report, however, discusses it.

Senator BRANDEGEE. I would like to have the minority report inserted in the record also, so that we may see the text of each together.

Mr. WILLISTON. The whole matter shall be put in the record.

The majority and minority reports of the Committee on Interstate and Foreign Commerce of the House of Representatives are as follows:

[House Report No. 1428, Sixty-first Congress, second session.]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 25335) relating to bills of lading, having considered the same, report thereon with a recommendation that it pass.

The provisions of the bill are substantially as follows:

Section 1 defines an order bill of lading and prescribes its contents.

Section 2 defines a straight bill of lading and prescribes its contents.

Section 3 provides that carrier shall be liable to any person injured or damaged on account of failure to comply with the above provisions as to either an order or straight bill of lading.

Section 4 contains the substance of the measure and provides that whenever a carrier, first, shall issue a bill of lading before the whole of the property described therein has been actually received, or, second, shall issue a second or duplicate bill of lading without properly marking it "duplicate," it shall be estopped as against the person holding or the owner of such bill of lading, to deny the receipt of the property or assert that a former bill of lading remains uncanceled for the same property; and shall be liable to the consignee or owner of the bill of lading for damages caused by its failure to observe the provisions of the section.

The proviso to this section relieves the carrier from liability wherever a bill of lading is issued and the goods are loaded and described by the shipper.

Section 5 provides that in case a carrier delivers property described in an order bill of lading without requiring its surrender or cancellation, in whole or in part, such carrier shall be liable for damages caused by reliance upon such outstanding bill.

Section 6 relieves the carrier from liability wherever property covered by bill of lading is removed from the carrier by process of law or proper disposition of perishable, hazardous, or unclaimed goods.

Section 7 makes void any alteration of the bill of lading without authority from the carrier, but provides that such bill of lading shall be enforceable according to its original tenor.

This measure thus covers four main features, namely: (1) It provides for a liability of the carrier upon bills signed by its agent, although the goods have not been received in whole or in part; (2) it provides for a liability for the negligence of the carrier upon order bills of lading where the goods have been delivered and the bill left outstanding; (3) it provides that altered bills without authority shall be good for their original tenor; and (4) it requires the printing of "order of" on order bills, the omission of the words "not negotiable" from such bills, and the stamping upon straight bills of the words "Not negotiable," and provides a liability in damages to anyone suffering from a violation of these provisions.

One of the great dangers and causes of loss in connection with bills of lading has been their issue by authorized agents, either fraudulently or as an accommodation to the shipper, before or without the goods having been received. When the holder for value of the bill has looked to the carrier for the goods he has been met with a statement that the goods have never been received and a denial of liability on the part of the carrier under the rule of the common law that the agent had no authority to issue bills where goods are not actually received, and that the carrier was not liable for the unauthorized acts of his agent.

The common-law rule has been followed by the Supreme Court of the United States and by the courts of Massachusetts, Ohio, Louisiana, Minnesota, North Carolina, Maryland, Alabama, Arkansas, Mississippi, and Washington. But in Maryland, Alabama, Arkansas, Louisiana, and Mississippi statutes have been enacted to establish the same rule as in the pending bill.

The courts of New York, Pennsylvania, Kansas, Tennessee, Illinois, Nebraska, and possibly Missouri hold that whenever a station agent of a railroad issues bills of lading for goods never received and the bills come in to the hands of an innocent purchaser for value the carrier is estopped from denying the receipt of the goods. In Massachusetts, Ohio, and Minnesota, and probably other States, statutes exist making it a crime for an agent to knowingly issue a fictitious bill.

The commissioners on uniform State laws have submitted a uniform bill-of-lading law which contains provisions similar to this measure, which with slight amendments have been enacted in the States of Michigan, Minnesota, Washington, and Wyoming.

The State statutes and rules of law are conflicting, inadequate, and uncertain, which result in injustice and injury to the producing and shipping interests of the country. The total annual transactions under the bills of lading in the United States amount to fully \$3,000,000,000, and of this probably 90 per cent would be interstate shipments.

In section 20 of the act to regulate railroads, approved June 30, 1906, known as the "Hepburn Act," Congress did legislate upon the liability under interstate bills of lading as between shippers and carriers. This measure extends such legislative recognition of liability of the carrier, for its own wrongful acts, to innocent holders for value of its bills of lading.

That the public welfare would be subserved by this legislation is well stated in the opinions of the courts of Kansas and Minnesota.

In *Bank v. Railroad* (20 Kans., 519) Chief Justice Horton gives a convincing statement of the reasons why the commercial holder of a fictitious bill should be protected. He says:

"Our State is a great producer of grain, large amounts of which seek markets outside of its boundaries. The means of its transportation are mainly limited to railroads, and commercial transactions by grain dealers extend to millions each year. The great mass of these products, when started to eastern markets, is purchased and paid for through bills of lading. The custom of grain dealers is to buy of the producer his wheat, corn, barley, etc., then deliver the same to a railroad company for shipment to market. The railroad company issues to the shipper its bill of lading. The shipper takes his bill of lading to a bank, draws a draft upon his commission merchant or consignee against the shipment, and attaches his bill of lading to the draft. Upon the faith of the bill of lading, and without further inquiry, the bank cashes the draft and the money is thus obtained to pay for the grain purchased, or repurchase other shipments. In this way the dealer realizes at once the greater value of his consignment and need not wait for the returns of the sale of his grain to obtain money to make other purchases. In this way the dealer with a small capital may buy and ship extensively; and while having a capital of a few hundred dollars only, may buy for cash and ship grain valued at many thousands.

"This mode of transacting business is greatly advantageous both to the shipper and the producer. It gives the shipper who is prudent and posted as to the markets almost unlimited opportunities for the purchase and shipment of grain and furnishes a cash market for the producer at his own door. It enables the capitalist and banker to obtain fair rates of interest for the money he has to loan and insures him, in the ways of bills of lading, excellent security. It also furnishes additional business to railroad companies, as it facilitates and increases shipments of produce to the markets. A mode of business so beneficial to many classes ought to receive the favoring recognition of the law to aid its continuance."

In *Ratzer v. Burlington* the Supreme Court of Minnesota said:

"A vast portion of the produce of this country is moved from the agricultural districts to the commercial centers and the seaboard by aid of advances made on the security of such bills of lading. A well-established custom has grown up in commercial circles by which such bills of lading are treated as the symbols of title to the property in transit; are taken as security for money advanced and indorsed and delivered as a transfer of the property. This is well understood by the railroad companies and everyone else. To allow the railroad companies to ignore this custom would be to destroy the custom itself. This would cause great hardship, revolutionize business methods, and drive all buyers and shippers of small means out of the business, as they could no longer give ready and available security on commodities in transit, and thereby turn their limited capital sufficiently quickly and often to enable them to do business.

"This, in turn, would destroy competition and leave the business in the hands of a few concerns with unlimited capital. Neither have the railroad companies any right to ignore this custom. On the contrary, it must be held that these companies have been doing business with reference to this custom as much as the shippers themselves, and the consignees, banks, commission merchants, and others who are continually advancing money on the faith of the security of these bills of lading. The effect of this custom, independent of statute, is to make bills of lading to some extent and for some purposes negotiable, and to give superior rights to innocent transferees in the usual course of business."

Many cases have been brought to the attention of your committee where bills of lading have been improvident issued by the carriers either for property partially received or not received at all, or suffered to be taken from the control of the carrier without any attempt by the carrier to properly care for the same or notify the holders of the bills of lading, or without the surrendering of the original bill of lading or properly marking the duplicate bills of lading. Very serious losses have occurred, to such extent as to imperil the value of bills of lading for use as collateral security in the movement of crops and commodities.

This condition threatens to be so serious as to interfere with the procuring and use of sufficient funds to move crops during the present year; and some such extension of legislation as this may be necessary to compel greater vigilance on the part of the carriers to give confidence to merchants and investors and provide the means for preventing congestion of freight at the producing points in the West and South. It has been shown to your committee that in some sections and on some railroads a practice has been permitted for some local agents at points of severe competition to issue accommodation bills of lading where the goods had not been wholly received or brought under the full control of the carriers. This custom is extremely reprehensible, conduces to favoritism and fraud, and results in serious injury to the general public. These

provisions of the bill need not be onerous to the carrier, but should help greatly in providing sufficient facilities to carry on the vast business of the country.

The pending bill does not affect foreign or ocean traffic, does not attempt to make bills of lading negotiable instruments, and contains no provisions for criminal penalties, which are and should be cared for by the various States.

VIEWS OF THE MINORITY.

Being unable to concur with the favorable recommendation accompanying the report of this bill, the undersigned respectfully submit the following suggestions:

AN OLD SUBJECT.

The subject matter of this bill has been before Congress for several terms. The old bill was lately amended by our committee in several particulars, including the omission of all criminal provisions and all reference to foreign business. After being so amended it was rewritten and reintroduced in its present form.

CONSTITUTIONAL PARTS ALREADY PROVIDED FOR.

In so far as it is within the power of Congress to enact the provisions of this bill into law, the subject matter is already adequately provided for by existing statute. It will be observed that the bill reverses the usual order of dealing with transportation as the basic fact to be regulated, and treating the bill of lading as only an incident to evidence the fact. This bill deals directly with the incident itself, regardless of the existence or absence of any actual transportation to authorize any bill of lading. That is in marked contrast with existing law in the Hepburn amendment referred to in the majority report. It makes the following requirements:

"Any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

It is understood that the carriers have generally adopted a form of bill of lading approved by the commission which is satisfactory to the parties to the shipment, consignor, carrier, and consignee. That uniform bill of lading is also capable of meeting all the requirements of shippers and the discounting banks, which are promptly and intelligently adapting this uniform bill of lading to their purposes, as shown by the following circular of instructions being sent out by them to shippers:

"No loans will be made by this bank secured by bills of lading unless they are on the uniform bill of lading as approved by the Interstate Commerce Commission June 27, 1908, and after it has been verified by the bank located at the point of issue, or acknowledged by the local freight agent before a notary public or commissioner of deeds, or guaranteed by a surety company. Please let us know whether in your opinion it will be practicable for you to get your bills of lading so verified."

The reference to a surety company is so ridiculous as to be taken as a joke.

Local bankers accepting these bills and drafts can easily protect themselves and all other banks against fraud. Being in the immediate locality with the carrier's agent and the consignor, it would require as little care as is usually exercised in making ordinary loans and discounts.

The consignor usually ships the goods for delivery on a sale already made or to be negotiated. For convenience, and to secure prompt payment of his purchase money, he draws a sight draft, attaches it to the bill of lading, and deposits both in the local bank, which transmits them to its correspondent bank at the point of destination, which delivers the bill of lading when the draft is paid. In prospect of collecting the draft, the bank often advances to the consignor money on the faith of the shipment. There is no trouble about that if the initial parties are vigilant and the original equities are not altered or disturbed.

COMPLAINTS WHICH THE BILL SEEKS TO REMEDY.

The banks which make advances on the shipments complain of occasional loss from two causes: First, the carriers deliver to the wrong party, and when the indorsed bill of lading is presented demanding the goods they are not forthcoming; second, sometimes the bill of lading is untrue in its recitals. Although issued in connection

with actual shipment, the goods had not been completely delivered to the carrier, and the bill was prematurely issued to accommodate the shipper. Sometimes there is no shipment made nor contemplated, but by collusion the agent of the carrier issues to a confederate a paper purporting to be a bill of lading but based on no fact of transportation, no freight having been delivered to the carrier. For these troubles the banks present this bill. As to the delivery at destination, the matter is undoubtedly within the jurisdiction of Congress, because there is actual transportation, but it is already provided for in the paragraph quoted, requiring delivery to the lawful holder.

There are already rules and regulations on the subject, and the railroad bill which lately passed the House carries an amendment clothing the Interstate Commerce Commission with jurisdiction over the whole subject of bills of lading. Due diligence will in most cases avert mistakes and inconvenience at the point of destination. The change in this bill proposed would involve confusion, delay, questions of demurrage, storage, and notice. The bill does not sufficiently provide for safeguarding these matters. Under the uniform bill of lading now in use, no delivery is made without production of the bill of lading.

The case of the bill of lading issued prematurely, or carelessly, as an accommodation, or convenience, pending real delivery into the custody of the carrier of an actual shipment of interstate transportation, is also within the jurisdiction of Congress, but it is also fully covered by existing law against discrimination. Such transactions are plain violations of the law for which adequate remedies are provided, both civil and criminal. They should be punished, whether loss results or not.

REAL PURPOSE OF BILL.

The real purpose of this bill, however, is to find an easy remedy or preventive for loss by the last-described case of discounting a draft attached to a spurious bill of lading issued collusively and fraudulently by an agent of the carrier delivered to a confederate not based upon any actual shipment in custody or in prospect. It provides that when any agent of a carrier, under whatever circumstances or cause or collusion, without receiving any freight for the carrier to transport, shall issue a paper falsely stating that goods have been received, the carrier shall be liable on that paper to any person who may purchase it without notice of its character. Is it right for us to make that provision? In the first place, the agent in issuing that paper is not in the discharge of his duty, has no authority, express or implied, to issue a bill of lading except when he has received freight. It is entirely outside of his usual line of duty, and without any authority to write and issue any paper save a memorandum of the reception of freight.

Under the common law, as recognized by the majority report, the reception and custody of the goods constitute the foundation of the contract of affreightment. There could be no valid paper evidence of the foundation fact that never existed. It is also correctly stated that the Federal courts follow that rule. But there is another insurmountable trouble, which the proponents of this bill have tried to talk around for years, but have never surmounted it nor avoided, evaded, nor explained it. It still stands. Our jurisdiction, conferred by the Constitution, is to regulate interstate commerce. The subject of our jurisdiction is, in this particular, the transportation of commodities from one State to another. If such transportation exists, we can regulate it, and regulate all the evidences and memoranda and tokens about it, but if there is actually no offer of a commodity for transportation there is no instance or basic fact of interstate commerce.

If nothing is done but the execution of a false bill of lading by one conspirator and delivered to another, that is not interstate commerce: that is merely local rascality. No such case has ever occurred in this Union, or ever will occur, which can not easily be reached and punished by local authority. When we insisted as one argument against this bill that it attempted to create Federal offenses to be tried and punished in Federal courts contrary to the Constitution, when local authority had exclusive jurisdiction; when our committee, by the consent of the proponents of the bill, struck the criminal features they were reminded that constitutional warrant to deal with a subject does not depend on or differentiate between civil and criminal law. If it is unconstitutional to make that act a Federal crime and punish it as derogatory to interstate commerce, it is alike unconstitutional to provide as to the liability on the civil side of the court growing out of the transaction. There is no rational line of distinction. We have no authority to legislate about that paper, either civilly or criminally, because no freight being received the execution and uttering of the false paper, based on no act or intention or transportation, is merely a local crime for local authority to deal with. If we had jurisdiction to deal with that transaction, we would certainly resist the amendment (made in the old bill) striking out the criminal punishment of the guilty parties, both the agent and his confederate.

To make the carrier liable and at the same time exempt from punishment the guilty perpetrators, doubtless insolvent, would tend to encourage rather than to deter commission of the crime. There is another consideration which can not be ignored. Although nobody appears to take much interest in this fight except the banks on one side and the railroads on the other, yet they are by no means the only people involved or to be considered. The interest of the great public must be conserved. Sound public policy must be upheld. We are compelled to have banking facilities, and ought to have better than we now enjoy; but we have a Committee on Banking and Currency, and measures affecting banking operations ought to profess that purpose honestly and go to the proper committee. Our committee is concerned with the question of transportation. The transportation companies are intended to receive, transport, and deliver passengers and property. We have been trying for years, with only partial success, to hold them up to the performance of those duties. It is now proposed, in order to make it a little easier and more certain for the banks to make their discounts secure, to require the carriers to assume another duty. They must provide their shippers with bankable, negotiable paper, regardless of its effect upon their performance of their proper duties.

Their efficiency as carriers might thereby be impaired and the difficulty of regulation as such carriers increased to the injury of the shipping public, which is entitled to rely on banks for banking facilities and on common carriers for transportation.

BILL WOULD LEGALIZE REBATES.

The public is also concerned about the prospect of a fruitful field for rebates, which the provisions of this bill would unquestionably open up and legalize. Honoring false bills of lading would operate as a rebate. Allowing "shippers' load and count" would permit rebates and discrimination, and violate the pet plea of "uniformity."

WOULD COMPEL PARTIES TO MAKE CONTRACTS.

Although disclaimed by the majority report this bill would compel parties to enter into contracts against their will. Our policy has been to require carriers to perform duties, prohibit them from limiting liability or exempting themselves from duty by statements on bills of lading. We compel them to issue proper evidence of their undertakings and transactions. We have never attempted to compel them to enter into contracts. True, the language of this bill provides that "whenever issued" the bill shall contain certain things, but existing law compels the issue of a bill or receipt as evidence of every shipment. This bill, defining the only two varieties known or possible, declares what they shall contain, thereby directing the compulsion of existing law into compelling the kind of contracts desired.

THE USUAL CHIMERICAL PLEA OF UNIFORMITY.

There is nothing in the argument about uniformity. The laws, legal principles, and adjudications governing these questions are as well settled, understood, and as nearly uniform as those relating to any other subject.

FORGED BILL NOT COMMERCE.

The other argument, that we can hold a carrier liable for a forged or fraudulent bill of lading not based on actual shipment, because the Supreme Court said "that commerce included intercourse," is equally unhappy. If any gentleman will take the pains to read the opinion from which that is quoted, and read the facts on which the opinion is rendered, he will require no argument to convince him that the court had in mind persons going about from State to State in actual interchange of visits and transactions, walking across bridges, riding in vehicles, going from State to State for various purposes, coming legitimately in contact with one another, and not the false and clandestine commission of a crime within one State by two persons, in which they execute and issue a false and fraudulent paper, doubtless a crime under the laws of any State in the Union.

BILL ENTIRELY OMITTS FOREIGN BUSINESS, WHICH WAS REPRESENTED TO OUR CONSTITUENTS AS IMPORTANT FEATURE.

The most peculiar feature about it is this: Most of the people who have written to us have claimed this legislation to be essential to move our crops to Europe; that the export of cotton could not be carried on without this legislation. Recent disclosures

of defalcations about people who have swindled foreign firms through false and fraudulent bills of lading have inspired the only demand the people have sent us for this legislation, and yet all foreign business has been omitted from this bill.

Whether there is a disposition to hamper the exportation of cotton, to narrow the market, and depress the price, or whether there is a patriotic disposition to take care of home banks, and skin the foreigner, we are unable to judge, but why the provisions of this bill should be insisted on as to domestic transactions and the provisions of the old bill as to all exports and dealings with foreigners omitted, is utterly incomprehensible to us, especially when it is sought to influence our action by representing to our constituents and having them write us on the theory that the price of cotton, depending on facility of export, could not be maintained without this legislation. There is no justification for this bill; there is no business necessity for it; there is no danger it seeks to avoid which can not be averted by proper diligence; there is no act aimed at by it that can not be reached and prevented or punished by existing law, either Federal or local.

Respectfully submitted.

W. C. ADAMSON.
C. L. BARTLETT.

MR. WILLISTON. We also submit the opinion of the Hon. Henry W. Taft on the constitutionality of the law, and if the committee feels a doubt as to the constitutionality I should like to say, briefly, a very few words in regard to that.

The opinion is as follows:

OPINION OF HENRY W. TAFT, OF STRONG & CADWALADER, NEW YORK CITY.

I understand that my opinion is desired upon the following question, viz:

Whether, if the bankers procure an act of Congress making carriers responsible in cases where their agents, having general authority to issue bills of lading for merchandise received, fraudulently issue such bills for merchandise not received, the courts (particularly the United States Supreme Court, which would be the ultimate authority) might not hold the act to be a mere arbitrary attempt on the part of Congress to make one person liable for the unauthorized unlawful act of another, and therefore invalid.

The question of the liability of a carrier to an innocent third party upon a false bill of lading has been frequently considered in the courts of England and of this country; but the decisions as to the correct rule of law upon the subject have not been uniform. In England it was held, in 1851, that the carrier was not liable upon a false bill of lading (*Grant v. Norway*, 2 E. L. & E., 337); and this rule has been adopted by the Supreme Court of the United States and the highest courts of the States of Alabama, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, North Carolina, Ohio, and Washington. The contrary doctrine prevails in the States of Illinois, Kansas, Nebraska, New York, and Pennsylvania. In order to settle the law, the States of Louisiana, Alabama, Arkansas, Maryland, Mississippi, and Missouri have enacted statutes with the purpose (not always successful on account of the interpretation of the statutes adopted by the courts) of imposing upon the carrier a liability upon false bills of lading. While the effect of these statutes has been considered by the courts in a number of cases, the question of their constitutionality has not been raised or decided. We are not therefore directly aided by the decisions in solving the question under consideration. It is not without some significance, however, that in no decision has a doubt been suggested that the statutes were constitutional.

I come, then, to the question of the power of Congress to adopt the proposed legislation.

Article 1, section 8, of the Federal Constitution provides as follows, viz:

"Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with Indian tribes * * *

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any of the departments or officers thereof."

An examination of numerous decisions of the Supreme Court leads to the conclusion that the general subject of the proposed legislation is clearly within the power of Congress under this clause. A bill of lading is simply an instrumentality under which an interstate transaction is undertaken. It relates to and is one of the elements of commerce among the States. Such commerce "comprehends * * * intercourse for the purposes of trade in any and all its forms, including transportation,

purchase, sale, and exchange of commodities between citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted" (*Hopkins v. U. S.*, 171 U. S., 597). "A bill of lading or some written instrument of the same import is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another." (*Fairbank v. U. S.*, 181 U. S., 283.)

A more serious question remains, however, viz, whether the proposed exercise of the power would be a violation of the fifth amendment of the Federal Constitution, which provides that "no person shall * * * be deprived of life, liberty, or property without due process of law." It would not be a violation of that amendment unless it amounted to an attempt arbitrarily and unreasonably to regulate legal rights. But if the proposed legislation is merely enacted pursuant to the general power which every government has to deal with the regulation of personal and property rights in the interests of the public at large and for the welfare of the State, it is not a violation of the amendment. I am of the opinion that such is the character of the proposed act, and Congress will pass it, if at all, because in its discretion it concludes that the disturbance of common-law rights is less important than that stability should be given to an instrument of commerce of such wide circulation as the bills of lading of common carriers.

Acts of a similar character have frequently been upheld. Under an act of Congress, passed 1851, the liability of shipowners for loss or damage to goods was limited. Here was clearly a change of the legal relation between shipper and carrier; but this act was declared within the power of Congress. The following instances of other statutes which have been held to be within the legislative power may also be mentioned, viz: One imposing a liability for damages upon a railroad corporation caused by a failure to fence its railroad (*Missouri Pacific Ry. v. Humes*, 115 U. S., 512); a statute of Indiana changing the rule of the common and maritime law by imposing a civil liability in favor of the personal representatives of the deceased upon any person causing the death of another (*Sherlock v. Alling*, 93 U. S., 99); a statute of Utah imposing upon any person driving a herd of cattle over a public highway on a hill-side a liability for damages whether he was negligent or not (*Jones v. Brim*, 165 U. S., 180); a statute of Missouri imposing a liability upon railroads for injury of property by fire from locomotives, whether there was negligence or not (*St. Louis, etc., Ry. v. Matthews*, 165 U. S., 1); a statute of Nebraska making railroads insurers of passengers, the rule being applied in a case where the plaintiff sought to recover damages for injuries received in an accident which was due to criminal act of third party (*Chicago & R. I. Ry. v. Zernecke*, 183 U. S., 582); a statute imposing upon a railroad company an absolute responsibility for damages to the owner of any property injured or destroyed by fire, communicated directly or indirectly by locomotive engines in use upon its railroad, irrespective of the question whether the railroad company or its agents were in the exercise of due care (*St. Louis & San Francisco R. R. Co. v. Matthews*, 165 U. S., 1). In *Pierce v. Van Dusen* (78 Fed. Rep., 700) Justice Harlan, speaking of a similar act, said that undoubtedly the whole subject of liability of interstate railroad companies for the negligence of those in their service may be covered by national legislation enacted by Congress under its power to regulate commerce among the States.

In *Orient Ins. Co. v. Daggs* (172 U. S., 553) it was held that a statute which created a conclusive presumption that the amount for which property was insured, less any depreciation since the date of the policy, was the actual value of the property, and prohibiting stipulations in a policy which would create a different result, was not unconstitutional.

I do not think that the proposed legislation would be a more arbitrary or unreasonable exercise of legislative power than that in any of those cases.

The right of exemption from liability upon a false bill of lading at most a right based upon a rule of common law, but it was said by Chief Justice Waite, in the leading case of *Munn v. Illinois* (94 U. S., 113-134):

"But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law can not be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adopt it to the changes of time and circumstances."

And Judge Bradley, in *The Lottawanna*, 20 Wallace, 558, at page 571, said:

"It can not be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under

the commercial power, if no other, to introduce such changes as are likely to be needed."

In *The Irrawaddy*, 171 U. S. Reports, 187, at page 193, the Supreme Court applied the same rule in applying the provisions of the so-called "Harter Act," which prescribed, among other things, what was to be contained in bills of lading for goods carried in ships and changed the law theretofore prevailing in relation to the liability of shipowners under such contracts. (See also *The Delaware*, 161 U. S., 459.)

It is sometimes loosely stated that legislation which interferes with "vested rights" is unconstitutional in that it deprives persons of property without due process of law; but this is not different from saying that an individual is not to be deprived of his property arbitrarily and unreasonably and is therefore covered by what I have already said. (Cooley on Constitutional Limitations, 4th ed., p. 443.)

As the courts of States of large commercial importance have not only found the rule proposed for adoption consonant with the principles of the common law, but also practicable and just in its application, it can not be presumed that the Supreme Court will find it so shocking to the sense of justice of the community at large as to be regarded as unreasonable or oppressive. The Supreme Court has itself established rules in similar cases which seem to the ordinary mind, from the standpoint of abstract justice, not essentially different in principle and effect. For instance, the court has held that it could not be shown against the bona fide holder of coupons that the bonds from which they were detached had been fraudulently issued, saying that "when a loss is to be suffered through the misconduct of an agent, it should be borne by those who put it in his power to do the wrong rather than by a stranger." (*County of Macon v. Shores*, 97 U. S., 272.) In *Hoover v. Wise* (91 U. S., 312) a principal was held liable for the fraudulent acts of a subagent. In *Stockwell v. United States* (13 Wallace, 531) the other members of a firm were held liable in double damages for the act of a partner in smuggling goods for the firm, although they had no knowledge of the transaction.

The proposed law will simply create a new rule of action, and any possible injustice must be guarded against by the carrier by the use of greater care in the selection and supervision of its agents. In that respect the company has the means at hand to reduce the risk, while under the rule sought to be superseded the business community has no other way to protect itself. A law which will create in such a large class as those who become holders of bills of lading confidence and stability in commercial transactions, even at the cost of increasing the risk on the part of another class, particularly where the latter class is composed of corporations engaged in interstate trade expressly subject under the Constitution to regulation by Congress, might clearly, I think, appear to Congress to be a measure in the interests of the public welfare, and if Congress should act I am of the opinion that the Supreme Court would not revise the legislative discretion.

I have not examined the proposed act in order to advise whether it is sufficiently explicit to accomplish the desired purpose, as I suppose your regular legal adviser has satisfied himself upon this point.

[Sixtieth Congress, first session; before the Committee on Interstate and Foreign Commerce.]

BRIEF AS TO THE POWER OF CONGRESS UNDER THE CONSTITUTION TO ENACT SECTION 20i OF THE BILL H. R. 14934, TO AMEND AN ACT ENTITLED "AN ACT TO REGULATE COMMERCE," BY HENRY W. TAFT.

Section 20i of the proposed bill prohibits the issuance of a bill of lading until the whole of the property described therein shall have been actually received by the carrier. It further provides that "the issuing carrier shall be liable to any bona fide holder for value of any bill of lading issued by such carrier or his agent in violation of the provisions of this section, who may be injured thereby, for all damages, immediate or consequential, arising therefrom."

The question has arisen as to whether these provisions are within the power of Congress under Article I, section 8, of the Constitution, which provides that Congress "shall have power * * * to regulate commerce with foreign nations, and among the several States and with the Indian tribes." The doubt implied in this question is based upon the suggestion that until the property mentioned in a bill of lading has been delivered to the carrier, interstate commerce can not begin and the entire transaction will be local and subject only to State jurisdiction.

Two classes of cases may arise in which the proposed section 20i would be applicable. These are (1) where the agent of the carrier and the shipper enter into a contract of transportation by the delivery and acceptance of a bill of lading describing goods which are in existence but have not been actually delivered to the carrier, and the transportation of which the carrier and the shipper in good faith expect to be undertaken in accordance with the conditions of the bill of lading, and (2) where, for the

purpose of creating a fraudulent instrument on which to procure credit, a bill of lading is issued by the agent of the carrier to the nominal shipper describing goods which have no existence. If Congress has, under the Constitution, power to deal with either of these classes, it would be justified in enacting Section 20i.

1. Where the carrier and the shipper enter into a legal contract for the shipment of goods which are in existence although not actually delivered to the carrier, an act has been done preliminary to actual interstate transportation and is one of the steps generally preliminary thereto. While it is true that the goods are not in the physical possession of the carrier, the legal rights of the carrier and the shipper with reference to them have been definitely fixed. The shipper, on the one hand, could compel the carrier to transport the goods or recover damages for its failure so to do; while, on the other hand, the carrier could enforce his right to collect the freight charges. Thus the interstate character of the transaction is dependent not alone upon the intention of the parties, but a step has been taken which usually precedes every shipment across the State line and has a definite legal significance. By the delivery of the bill of lading, the carrier, for the purposes of transportation, has constructive possession of the goods.

Interstate commerce is not the mere handling, in the physical sense, of the object delivered to the carrier. "Commerce in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care and various mediums of exchange, become commodities and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulations" (*Gibbons v. Ogden*, 9 Wheat. 229). And in the same case Chief Justice Marshall said that commerce was "intercourse" and "is regulated by prescribed rules for carrying on that intercourse." Furthermore, commerce among the several States is a "unit" (*Northern Securities Case*, 193 U. S. 336), and "The test of power is not merely the matter regulated, but whether the regulation is directly one of interstate commerce" (*Employers' Liability Cases*, 207 U. S. 463, at p. 495).

Acts which are appropriate and necessary although preliminary to actual transportation among the States have always been regarded as being themselves of an interstate character and as within the power of Congress to regulate. This has been held particularly with reference to bills of lading, because they are instrumentalities of the commerce to which they refer and, therefore, subject to regulation by Congress (*Almy v. State of California*, 24 Howard 169; *Fairbank v. U. S.*, 181 U. S. 283; *Hopkins v. U. S.*, 171 U. S. 578; the lottery case, 188 U. S. 321). The power to regulate commerce comprehends "all the instruments by which such commerce may be conducted" (*Hopkins v. U. S.*, 171 U. S. 597). Congress has already in the Harter Act (Feb. 13, 1893) exercised the power now questioned. That act, among other things, provides that a bill of lading shall be prima facie evidence of the receipt of the goods described therein. It has been several times before the Supreme Court and its constitutionality has never been questioned. (See *Isola di Procida*, 124 Fed. Rep. 942.)

In *Swift & Co. v. United States* (122 Fed. Rep. 531), Judge Grosscup said that commerce included "the intercourse—all the initiatory and intervening acts, instrumentalities and dealings—that directly bring about the sale or exchange. * * * The whole transaction from initiation to culmination is commerce. * * * But it is not transportation that constitutes the transaction interstate commerce."

2. The question whether the second class of cases, where no transportation takes place or is intended ever to take place, comes within the constitutional power of Congress can not be answered without considering (1) the general purpose of the proposed legislation, and (2) whether the provisions of section 20i are appropriate to accomplish that purpose and so remotely connected with it as to be merely incidental.

Speaking of the power of Congress under the commerce clause of the Constitution, Chief Justice Marshall in *McCulloch v. State of Maryland* (4 Wheat., 421) said:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

The proposed bill contains a variety of provisions concerning bills of lading, all relating to shipments "from a point in one State to a point in another State * * * and from a point in the United States to any foreign country." (Secs. 20a, 20f.)

The obvious purpose is to regulate interstate transportation by defining rights arising under bills of lading which contain the regulations and conditions under which such transportation is undertaken. It would be entirely inadequate to such an end to deal only with those cases where transportation was directly involved and not with those cases where it was indirectly affected. Federal jurisdiction is not to be determined by inquiring whether there has been, in a particular case dealt with by Congress, actual transportation across the State line, but by considering whether interstate commerce as a whole is beneficially regulated.

The proposed bill assumes the existence of a carrier engaged in inter-state traffic and establishes rules for the regulation of commerce directly connected with such traffic. It does not contemplate particular interstate transactions, but only the whole body of the commerce of which such transactions form a part. Congress may well believe that it can not adequately regulate that portion of interstate commerce represented by order bills of lading unless it also prohibits the issuance of similar instruments, which purport to represent such transactions, but actually do not. The provisions as to false bills do not, therefore, assume an interstate character by virtue alone of the subject matter with which they purport to deal, but also because, in the opinion of Congress, their issuance interferes with the adequate regulation of a body of other transactions which do have such interstate character, and with the orderly regulation of which they are inextricably involved.

Upon the hearing before the committee the acting chairman asked whether the principle claimed to be applicable in the present case had ever been applied by the courts where the specific act upon which Federal jurisdiction was based was done wholly within a State. In response to this question it is sufficient to refer to the following cases:

In *Brennan v. Titusville* (153 U. S., 289) the Federal jurisdiction was based upon the act of a drummer within a State soliciting a person to purchase his goods.

In *Swift & Co. v. United States* (196 U. S., 375) a combination of dealers in meat was held to be an illegal combination within the meaning of the antitrust act. In some cases the prices regulated by the combination were for cattle which had not been brought from another State, and for meat to be sold and consumed within a State. It is said in the headnote: "It does not matter that a combination of this nature embraces restraint and monopoly of trade within a single State if it also embraces and is directed against commerce among the States."

In *re Debs* (158 U. S., 564), Debs and others, during the strike in Chicago of 1894, committed certain acts within the State contrary to the terms of an injunction forbidding all obstructions to interstate commerce or the carrying of the mail. It was held that they obstructed the mails and interstate commerce and were therefore within the Federal jurisdiction.

In *Montague v. Lowry* (193 U. S., 38) an association was formed by various manufacturers of tiles whereby the members agreed to make no purchases from manufacturers who were not members of the association, and to sell no tiles to any one not a member except at prices 50 per cent higher than those established for members. The plaintiff, a dealer in California, where the association was formed, but who was not a member, was unable on account of the combination to purchase tiles. He brought action under section 7 of the antitrust act to recover treble damages. A judgment in his favor was sustained.

Justice Peckham said:

"It is urged that the sale of unset tiles provided for in the seventh section of the by-laws is a transaction wholly within the State of California, and is not, in any event, a violation of the act of Congress which applies only to commerce between the States. The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without at the same time altering the general purpose of the agreement. * * * The whole thing is so bound together that when looked at as a whole, the sale of unset tiles ceases to be a mere transaction in the State of California and becomes part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce."

In *United States v. Coombs* (12 Pet., 72) a Federal act imposing a penalty for thefts of goods belonging to vessels in distress, although such thefts were committed above high-water mark and within State jurisdiction, was held a proper exercise of the power to regulate interstate commerce.

In *McCulloch v. State of Maryland* (4 Wheat., 316) Chief Justice Marshall held that from the power to "establish post offices and post roads" there was to be implied the power, not only continuously to maintain the post offices and carry mail along post roads, but also to punish those stealing letters from post offices or robbing the mail, on the ground that this construction was "essential to the beneficial exercise of the power." The physical act of stealing a letter in a post office within a State is, of course, purely local and does not relate directly to an interstate transaction.

See for other illustrations: *Veazie Bank v. Fenno* (8 Wall., 533); *United States v. Rio Grande Irrigation Co.* (174 U. S., 690); *Welton v. State of Missouri* (91 U. S., 275); *Robbins v. Shelby* (120 U. S., 489); *Addyston Pipe & Steel Co. v. United States* (175 U. S., 211).

The conclusion which I have reached is not affected by the principle of the decisions of the Supreme Court which hold that such instruments as policies of insurance issued in respect of goods which are the subject of transportation from State to State or to

foreign countries do not involve interstate commerce. In *Hooper v. California* (155 U. S., 648) a contract of marine insurance was involved, and Justice White said that the distinction between that and an instrument of interstate commerce was based upon the fact that the former was one of "the mere incidents which may attend the carrying on of such commerce." Bills of lading, however, representing transportation by a carrier from State to State, are not merely incident to such intercourse, but constitute one of the means by which such intercourse is conducted. Policies of insurance upon goods in course of transportation, on the other hand, are not directly connected with the interstate nature of the transaction. While they usually attend such commerce, they do not constitute a condition upon which it is undertaken. Their connection, therefore, is too remote to be of Federal cognizance (see upon this point Judson on Interstate Commerce, sec. 7).

For these reasons, there is no substantial ground to doubt that section 20*i* of the proposed bill is within the power of Congress. But even if this is not entirely clear and yet in its legislative discretion Congress believes that the general purpose of the proposed legislation can not be effectively or beneficially accomplished without the enactment of the section, it should exercise its power and devolve upon the courts the responsibility of declaring upon the constitutionality of its action. It should not omit to take appropriate action merely because the Federal courts have not adjudicated upon an exactly similar case or because no express provision of the Constitution can be pointed out on which to base the exercise of power. As Justice Miller said, in *ex parte Yarbrogh* (110 U. S., 658), Congress should not yield to "the old argument often heard, often repeated, and in this court never assented to, that when a question of the power of Congress arises, the advocate of the power must be able to place his finger on the words which expressly grant it." If there be a real doubt of the power of Congress as to but one of many features of a general scheme of beneficial legislation it should resolve that doubt in favor of the theory that power exists.

HENRY W. TAFT.

APRIL 25, 1908.

It seems to us that in legislation that has already been enacted and approved Congress has committed itself and the courts have committed themselves to the view that such legislation as this is constitutional.

In the first place, a railroad doing an interstate business is itself an instrument of interstate commerce which Congress has power to regulate and has regulated in numerous ways; has imposed liabilities on the railroads different from the common-law liability.

The latest and most striking instance of this perhaps is the law by which there is imposed on the initial carrier the liability for a loss occurring beyond its own lines—a very striking exercise of congressional power and far beyond anything that we seek.

In the second place, even though the railroad itself which issued the bill were not itself an instrument of interstate commerce, even a fictitious bill of lading is a contract entered into for the carriage, or purports to be for the carriage, of goods from one State to another. Now it seems to me clear that Congress has the right to protect genuine interstate commerce by punishing fictitious simulations of it, and the fictitious bill is, of course, a simulation of a genuine contract to transport goods. Indeed, it is a genuine contract; even though there were no goods behind it, it is a contract for the transportation of goods from one State to another or to a foreign country, though the goods do not exist.

I wish to say before closing that at the hearing before the Senate, after the Stevens bill came from the House, the then chairman of this committee asked the proponents of the bill and the railroads who appeared in opposition to get together, if they could, and see if they could not agree upon something. Both parties earnestly and honestly tried to do what they could and certain amendments were agreed on, as I understand it. Yet the railroads themselves are unable to

assent to the fundamental proposition of the bill that the carrier should be liable, and of course the interests which I represent felt unable to yield that. So that this paper which we have had printed shows in italics the changes from the Stevens bill, or from Senate bill 957, which the carriers and the people whom I represent both thought ought properly to be made, and therefore I am to be understood, and the people whom I represent are to be understood, as urging the passage of the bill with these italicized amendments. On the other hand, as I understand it, the railroads, while they think the amendments are all right, are to be regarded as opposing the fundamental proposition in the bill.

Senator BRANDEGEE. I am not sufficiently familiar with the trouble which brings about the demand for this legislation, so that my mind at once gives assent to the proposition that a company ought to be liable for something done somebody which exceeds its authority.

Mr. WILLISTON. Of course if a bank cashier wrongly certifies a check, although his authority may be said to be only to certify checks where there is money enough in the bank, the bank pays the bill. If it is urged that a check is negotiable paper and that that rule ought to be peculiar to negotiable paper, I should say the same rule is applicable to a certificate of stock; that if the officers whose business is to issue certificates of stock issue one which they have no business to issue, under the circumstances, because they have not taken up genuine certificates to represent it, the company has got to pay the bill. And the fundamental principle back of it all, it seems to me, is this, that the man who hires an agent to do a certain job must be answerable for the consequences of that agent's acts in that job, whether he does it well or ill. Therefore, when a railroad employs a man to issue bills of lading it must stand behind the bills of lading that that man issues, whether he does it according to orders or whether he does it contrary to orders.

Senator POMERENE. Professor, in referring to the bill which bears my name—and I confess to be only the stepfather to that bill, although I am in hearty approval of it—you said you had some question as to the constitutionality of certain provisions. What provisions did you have in mind?

Mr. WILLISTON. Part 3, and one section of the criminal provision.

Senator POMERENE. That is section 3?

Mr. WILLISTON. No; part 3. I beg your pardon. The bill in the State was divided in to four parts; it is not so divided at it stands before you.

Senator POMERENE. I have here a copy of the bill.

Mr. WILLISTON. Yes; but that does not state the parts as it did in the other bill.

Sections 28 to 43, inclusive, relate to dealings in bills of lading between third parties, neither of whom is the carrier. That is, to the negotiation and transfer——

Senator POMERENE. To the negotiation simply of the bills of lading?

Mr. WILLISTON. Yes, sir. And it is that part which troubles me.

Senator POMERENE. Now, state briefly, if you can, what difficulties you see in connection with that matter?

Mr. WILLISTON. The clear ground of supporting Senate bill 957 is that the railroad is an instrument of interstate commerce, and Congress has a right to say what bills of lading a railroad shall issue, and what shall be its liabilities on that instrument.

Now suppose that instrument gets into the hands of A, a third person, and A pledges it to a bank in Ohio:

Query: Does the fact that that bill was originally issued by a railroad, an instrument of interstate commerce, give Congress the right to say what is the effect of the pledge by A, an outside holder of the bill, to B, a bank in Ohio?

That is my difficulty.

Senator POMERENE. It is still a contract pertaining to interstate commerce?

Mr. WILLISTON. Yes, sir.

Senator POMERENE. This is simply an offhand suggestion: Would not the holder take it subject to any of its provisions and its liabilities, whatever they might be?

Mr. WILLISTON. The holder would take the rights given by the bill against the railroad, and I think it clear that Congress would have the right to say what B's right shall be against the railroad. But can Congress say what are the relative rights of A and B as against one another?

Senator POMERENE. As between A and B?

Mr. WILLISTON. As between themselves. That is the matter dealt with in these sections that I have alluded to—the rights of A and B as between one another?

Senator POMERENE. Your position is that in that respect then the transferee of the bill of lading will be essentially different from that of the original consignor?

Mr. WILLISTON. A bill of lading is both a contract and a symbol of title to the goods. In so far as it is a contract, it is a contract of the railroad company, and B gets the contract rights which the consignor bargains for against the railroad company. But as to the property rights which B gets from A, that depends not on the form of the contract between the railroad company, but on what A owns, in large measure.

Senator POMERENE. Have you briefed that proposition?

Mr. WILLISTON. Have I put a brief on that matter?

Senator POMERENE. Yes.

Mr. WILLISTON. No; I had not anticipated arguing on this State bill to-day. We are prepared to argue and present authorities in regard to the constitutionality of the very limited provisions of Senate bill 957, and that argument which we should present would, in my opinion, uphold the constitutionality of your bill, if I may so call it, except the sections to which I have referred and the criminal section, section 48, which relates also to fraudulent dealings between A and B, outside persons.

Senator POMERENE. Have you in mind now any adjudications bearing upon this subject which would shed any light upon the question of the constitutionality of these provisions about which you have doubt?

Mr. WILLISTON. No; I have not. These sections to which I have referred I do not recall any decision which deals with the broad question—whether an interstate bill of lading carries stamped upon it

through all its ultimate wanderings the character of an instrument of interstate commerce and whether Congress could affix such qualities as it chooses to it and such rights in the property behind it that would universally follow it in the hands of third persons.

It may be that Mr. James, whom I see here, is better prepared to speak to that point than I am.

Senator POMERENE. That is all.

The CHAIRMAN. Who is the next gentleman who desires to appear in advocacy of the bill?

Mr. WILLISTON. There are one or two gentlemen who have come with me whom I should like to speak to the committee with reference to the practical workings of these difficulties.

The CHAIRMAN. Who is the next one?

Mr. WILLISTON. Mr. Harry Dowie.

There being no further questions, Mr. Williston was thereupon excused.

STATEMENT OF MR. HARRY DOWIE, OF NEW YORK CITY, REPRESENTING DE WINTER & CO.

The CHAIRMAN. State your name, residence, and occupation for the purposes of the record.

Mr. DOWIE. Harry Dowie; residence, New York City; connected with the firm of De Winter & Co. I also represent to-day the National Poultry, Butter and Egg Association and the New York Poultry and Game Association.

Mr. Chairman and gentlemen of the committee, the products that these associations represent are the largest in values of any products in the United States. Fully 90 per cent of this product is shipped from the country, from the producing sections, either to seaboard or the interior by bills of lading. These bills of lading are largely made out by shippers who gather these products from the farmers or the merchants and who ship them either in carload lots or less than carload lots with a bill of lading and a sight draft attached. This sight draft reaches us at the seaboard two or three or four days prior to the goods. We pay this sight draft and await the arrival of the goods.

Unless this bill of lading is a uniform bill of lading, made as secure and safe as any other negotiable paper, you can readily see the risks that we take by paying a draft on a bill of lading.

The abuses in the past have been many, and the losses have amounted to millions and millions of dollars. These losses have been occasioned by paying fraudulent accommodation bills of lading. It not only is a loss financially, but it has this other effect upon the country: There are many other shippers in this country whose sight draft it is unnecessary for you to look at, but you can pay their drafts when presented regardless of whether they may be over or not. But bills of lading issued by railroad companies and combinations, etc., to shippers who are springing up constantly all over this country, have to be paid with care. It is impossible for a commission man or anyone in New York in the business to keep track of all these shippers who are springing up, and it is necessary to investigate their standing. It is necessary for men of limited capital to obtain money on their bills of lading from the banks in order that they may continue to do business. We have been defrauded so many times by

bills of lading that when we receive a bill of lading from these various people, we scrutinize everything regarding it. If there is the slightest thing which looks doubtful, we will refuse to pay that bill of lading. We will hold it subject to the arrival of the goods, in order that we may see that everything is all right. This holding up of the money of the little man means that he hasn't sufficient money to operate. So that it throws the entire business into larger hands continually. That has been the result and will be the result as long as these bills of lading come as they are coming.

I can state to you personally a few distinct cases, but each of them represents a great many to show you how bills of lading have been made.

For instance, in one case—and this occurred several times from this same party after the railroad companies were notified—we received a bill of lading for a car which was shipped from Ohio to New York to Dewinter & Co. The bill of lading was properly drawn and signed, and was for 30 barrels of poultry and 140 cases of eggs. When the car arrived in New York with the seal still unbroken there were but 30 barrels of poultry, and no eggs.

That particular thing occurred several times, and the heads of the railroads in Chicago were notified what was being done, and still it existed after that.

We could attribute it to no other reason than that there were several roads from that point, and there was great competition in getting business, and the shipper was none too scrupulous to take advantage of it.

Then there was a very singular case of a car shipped from Tennessee with 380 cases of eggs. That car when it got as far as Buffalo on its way to us in New York was discovered to be an empty car. They had run the car all the way through to Buffalo, although the bill of lading was all right. The draft was paid on the bill of lading. This bill of lading was made on car so-and-so, and the draft was made on 380 cases of eggs, in car number so-and-so.

The only way we could get our eggs was out of that car, and there were no eggs in that car. The railroad company hauled that car all the way from Tennessee to Buffalo before it discovered it was an empty car.

Then there was the case of another heavy shipper from Chicago a few years ago. He would ship from 10 to 20 carloads a week in certain seasons of the year. He shipped to various parties in the East—New York, Philadelphia, and Boston. In no case was there ever a car number on any bill of lading coming from him. The result was that he might ship me a car of creamery butter and I might get a car of store-packed butter, and the creamery butter might go somewhere else. There was absolutely no way to identify in any shape, form, or manner the car. He continued doing business in that way for some years, but finally failed. Then there was a receiver appointed, and the receiver came East to find where the property was that this man had shipped. Inasmuch as there had never been any car numbers inserted in the bills of lading, they never could show that any man ever got anything from him; and the man who paid the sight draft on that bill of lading without a car number had no way to identify or trace where the car was.

Then there was the case of the issuing of accommodation bills of lading. A very large shipper in the Southwest shipped regularly. After waiting five days from the time the bill of lading was received a tracer was sent to find where the car was. The reply came back that the car was still on the track empty. The poultry was still flying around in the country to be killed and put into the car.

It was discovered that these bills of lading were being issued as accommodations. The result was that we refused to pay any draft until the arrival of the goods. As goods did arrive we paid the sight drafts. But the drafts kept coming into the New York bank, and the New York bank was ordered to hold these drafts for the arrival of the goods. It continued this way for some time, when the man failed. The bank of New York held some forty thousand odd dollars of these accommodation bills of lading. The banks in the West undertook to hold De Winter & Co. for this \$40,000, but it did not amount to anything in the end.

This only shows what is being done in the way of railroad companies issuing bills of lading for goods that do not exist, for the accommodation of the shipper, to the detriment of the consignee, because had we paid these drafts as they came in, we would have been the loser of \$40,000.

Now, those are only a few cases of what has happened to our firm directly. But there are many other cases that we are perfectly familiar with which show just the same bad management of the railroads, and for that reason, as commission men, for the welfare of the country shipper, the responsible shipper, it is absolutely necessary that bills of lading should be uniform bills of lading, that whatever it represents on its face should be true; so that a man would be perfectly safe, when a bill of lading was presented to him, to give his check for the amount that was called for in the draft attached to that bill of lading.

The CHAIRMAN. If you will return here at 2.30 o'clock this afternoon we will resume your examination.

Mr. Dowie was thereupon temporarily excused.

Mr. A. P. THOM. Mr. Chairman, before you adjourn——

The CHAIRMAN. Certainly.

Mr. THOM. I am A. P. Thom, general counsel of the Southern Railway Co.

The situation in regard to this hearing is somewhat of a surprise to me.

I am a member of an advisory committee representing about 100,000 miles of railroad in this country, and we are seeking to find the views of our constituent companies in regard to this measure on a basis submitted to them by myself. That condition grew out of a conference between Mr. Hollister, who is the chairman of the committee of bankers here; Mr. Peyton, who is their counsel; and Mr. Kent, who is one of the vice presidents of the Bankers' Trust Co. in New York, by which we undertook to see whether we could not get together upon some just and wise solution of this question that would subserve the proper interests of all concerned.

Mr. Kent presented the suggestions to the bankers and was to get from them their views; I presented them to the various railroads and was to get from them their views. Neither side, as I understand it, has as yet heard from all to whom these questions were presented;

certainly we have not; nor was I advised that the bankers had heard from their constituents in respect to it.

In the midst of that negotiation, before any end was reached, a proposition was made to this committee to open these hearings without my knowledge and without any conference with me. You can readily understand, therefore, that I am not here to-day prepared to say authoritatively what the attitude of all our constituent companies will be. We expect to be able to do that later. We yet hope, in the interests of a wise and just settlement of this matter, that some conference between us and the responsible advocates of this bill may be had which will result in a joint suggestion to this committee as to what is wise under all the circumstances.

We wish, in view of this surprise, and in face of the condition which I have described, eventually to ask at the hands of this committee that we may be permitted to be heard at a later date. And I do not understand that Mr. Hollister objects to that.

Mr. HOLLISTER. No, sir.

Mr. THOM. I suggest that we ask to be heard a couple of weeks from now. It will be more convenient to Mr. Hollister and his friends early in April, and that is perfectly agreeable to me. I simply arise now, as I have an engagement in the Commerce Court this afternoon and will be unable to be present, to ask that some arrangement be made by which we shall be heard at a later date. In the meantime any conference that may be possible will take place between these gentlemen and ourselves.

The CHAIRMAN. I do not think that the committee would want to defer this until April. Of course, the committee wants to hear both sides, and you will be given an opportunity to be heard. There will be nothing arbitrary in the action of the committee in that respect. I understand that there are others to be heard in favor of the bill, and at the conclusion of their side, if your side is not ready this afternoon, we will make some arrangement as to future hearings.

Mr. THOM. As I shall be unable to be present this afternoon, may I rely on having a couple of weeks to get this matter in shape?

The CHAIRMAN. This matter has been running for a long time. One bill passed the House the other session. It seems to me that with the amount of work we have—and we have to consider our time somewhat—that two or three weeks will be too long. However, we will arrange that at the conclusion of the hearing in favor of the bill this afternoon.

The committee thereupon, at 12.55 p. m., proceeded to the consideration of business in executive session, after which a recess was taken until 2.30 o'clock p. m.

AFTER RECESS.

At the expiration of the recess the committee reassembled.

The CHAIRMAN. Mr. Dowie, have you finished your statement?

Mr. DOWIE. Yes, sir.

The CHAIRMAN. Senator Cummins, do you desire to ask any questions?

Senator CUMMINS. What you want is a bill of lading which will warrant you in paying for the property before you receive it?

Mr. DOWIE. Yes, sir; which we have to do under all circumstances.

Senator CUMMINS. You are familiar with the bill that is before us?

Mr. DOWIE. Yes, sir.

Senator CUMMINS. Would you pay for a shipment on a bill of lading that was stamped or called "Shipper's load and count"?

Mr. DOWIE. We have refused that under ordinary circumstances but I understand recently, within two months, I think, there was a case of that kind carried to the court in Kansas and decided against the railroad company. They claimed that the railroad company was liable on "shipper's load and count."

Senator CUMMINS. Suppose that this bill was passed and a bill of lading came to you upon which those words were written, printed, or stamped; would you regard that as sufficient security for the advancement of money?

Mr. DOWIE. No, sir.

Senator CUMMINS. What good will this bill do you, then?

Mr. DOWIE. No, sir; I would not under a great many circumstances.

Senator CUMMINS. Inasmuch as the railroads always issue under this proposed act, a bill of lading of that kind if it desires to do it what security would you have that you have not now?

Mr. DOWIE. We would have no more security unless it be the law as decided by the courts, that they are liable. We personally would not pay a draft, shipper's load and count, promiscuously, even if that was the case, because it might incur a lawsuit—it might incur trouble. As business men we have to be very careful regarding these bills of lading now, especially on certain roads. We have got to be more particular on some roads than we have on others.

Senator CUMMINS. I do not believe you quite understand my question.

Mr. WILLISTON. If I may, I will reply to the question.

Senator CUMMINS. If the witness will permit you, I am willing.

Mr. WILLISTON. I do not understand that the railroad can mark any bill "shipper's load and count."

Mr. SOL WEXLER. There are certain commodities that are issued that way, but very few.

Senator CUMMINS. I notice in the bill the following proviso:

Provided, That where an order or a straight bill of lading is issued for property billed "shipper's load and count," indicating that the goods were loaded by the shipper, and the description of them made by him; and if such statement be true the carrier shall not be liable for the nonreceipt or by the misdescription of the goods described in the bill, in which event the estoppel and liability of above proviso shall not attach.

Mr. WILLISTON. That is true; but the point I wish to make was that the shipper has a right to demand that the railroad shall load and count. Sometimes it is convenient for the shipper to load and count himself, and he may take a load and count bill where he has got an inferior article. On the other hand, if he chooses, he may demand that the carrier load and count himself, and then the shipper, under this provision, could not mark the bills "shipper's load and count," and thereby escape liability.

Senator CUMMINS. If the shipper wanted an accommodation or there was a conspiracy to defraud, it is not likely that he would insist upon his right that the railroad should load and count, is it?

Mr. WILLISTON. The consignees and the banks understand that perfectly well. It is pretty hard work to get money on a shipper's load and count bill.

Senator CUMMINS. I am just trying to find out where you would be benefited any if they were all issued in that way.

Mr. WILLISTON. The shipper, who is the person who primarily wants financial accommodation, knowing that a shipper's load and count bill will not be accepted by the consignee, or will not be accepted generally as collateral by a bank, will demand that the railroads load and count if the shipper wants to get pecuniary accommodation.

Senator CUMMINS. I am not able quite to see that point. You have said that the evil to be remedied by this legislation is, first, collusion or fraud between the railroad agent and the shipper issuing a fraudulent bill of lading, or it might be by the railroad agent alone; second, accommodation bills of lading where the bill was issued before the railroad company actually received the property. Now in each instance—certainly in the last—it requires the cooperation of the shipper to perpetrate the wrong.

Mr. WILLISTON. Certainly.

Senator CUMMINS. Now, if the shipper were inclined to perpetrate a wrong of that sort, he would be perfectly willing, would he not, to take a bill of lading of that kind?

Mr. WILLISTON. No, sir; because it would not help him. Such a bill is like a package since the pure food law was passed. It has marked on it that it has poisonous ingredients.

Senator CUMMINS. That is what I ask you, whether he would advance the money upon it. One question more. Suppose the railroad companies refused to issue any other bill of lading than that kind?

Mr. WILLISTON. Our shippers would go to the Interstate Commerce Commission with perfect confidence that the railroad would be compelled to issue another kind. They understand that it is the business of a carrier to load and count if demanded.

Senator CUMMINS. I did not know that that was conceded; that is, load, I agree; but count—you say the railroad company must count?

Mr. WILLISTON. Senator Faulkner concedes that to be true, as representing the roads.

Senator CUMMINS. We had that up once before. Suppose I bring a box to a railroad company which I say contains a dozen chickens, to be shipped to New York. Do you mean to say that the railroad company has a right to open that box and count the chickens before it takes it?

Mr. WILLISTON. The receiver counts the number of chickens.

Senator CUMMINS. Precisely; that is just what I was getting at.

Mr. WILLISTON. But that will not be a shipper's load and count bill.

Senator CUMMINS. That would be a shipper's count bill, would it not?

Mr. WILLISTON. No, sir; because the bill of lading would be for a hundred boxes said to contain 20 chickens each.

Senator CUMMINS. And you want to hold the railroad company responsible for the actual count in that case?

Mr. WILLISTON. Only for the number of boxes. This proviso, to which your attention has been directed, excludes the liability of the railroad as to the number of chickens in the closed boxes. There must be the right number of boxes said to contain chickens. But if those statements are true, that is the extent of the railroad's liability.

Senator CUMMINS. In what part of the bill do you find that?

Mr. WILLISTON. It is in the copy of the bill containing amendments which is now being handed to the committee.

Mr. FAULKNER. These amendments that are in that copy just handed to you were the ones that were agreed to at that conference that we had, if you remember, and reported to your committee at the end of the last regular session.

Senator CUMMINS. Then it is not the bill that is now being urged.

Mr. FAULKNER. That is the bill that the gentlemen on the other side have presented, with the amendments printed in it, so that you will understand clearly what was the agreement to that extent.

Senator CUMMINS. Then I have it all wrong. I assumed that this was the bill that was now being urged.

Mr. FAULKNER. That is the bill that you have now in your hands that is being urged, except with the amendments which we agreed to and reported to your committee at the end of the last regular session.

Senator CUMMINS. The amendments seem to be very material.

Mr. WILLISTON. That proviso on the third page, and running on the fourth page, is material. It is substituted for a briefer proviso that was in section 4. The italicized proviso was taken from the State bill which Senator Pomerene has presented. It is identical with the provision in that bill.

Senator Cummins. Is that proviso satisfactory to you, Mr. Faulkner?

Mr. FAULKNER. Yes, sir; we asked that as an amendment in our conference, and it was agreed to on the other side, as all those other italicized amendments are.

There being no further questions, Mr. Dowie was excused.

STATEMENT OF SAMUEL WILLISTON—Resumed.

Senator CUMMINS. Mr. Williston, I desire to ask you one or two questions. I have not had time to examine this carefully, but tell me, in the proviso, what the words "such statements, if true" refer to; what statements?

Mr. WILLISTON. I wrote the proviso. This proviso was part of the State bill which Senator Pomerene has presented, and was drawn in conference with railroad attorneys and with the commissioners. The words—

Senator CUMMINS. Let me put another question so that my idea may be more clearly defined. I read now from the bill:

Provided, That if the property is described in an order or a straight bill of lading merely by a statement of marks or labels upon the property or upon packages containing it, or by a statement that the property is said to be of a certain kind or quantity, or in a certain condition, or it is stated in any such bill of lading that packages are said to contain property of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in any such bill of lading such statements, if true, shall not make liable the carrier issuing the bill of lading, although the property is not of the kind or quantity or in the condition which the marks or labels indicate, or of the kind or quantity or in the condition it was said to be by the consignor. The carrier may, also, by inserting in any such bill of lading the words, "shipper's load and count," or other words of like purport, indicate that the property was loaded by the shipper and the description made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the property described in the bill of lading.

I wish you would point out just what statement must be true in order that the carrier should be relieved of liability.

Mr. WILLISTON. To begin, then, back in the second line, the marks or labels upon the property must be what is stated in the bill of lading; or, go down in the next line; it must be true that the property was said to be of a certain kind or quantity—that is said by the shipper.

Senator CUMMINS. Pause just there—that somebody said to the agent that the property was of a certain kind and quantity?

Mr. WILLISTON. No; the shipper.

Senator CUMMINS. It does not say the shipper. It says, "or by a statement that the property is said to be of a certain kind or quantity."

Mr. WILLISTON. That in the bill of lading always means the shipper. "Received of X, 100 boxes, said to contain"—that is the formula commonly in use. That means said by the shipper to contain.

Senator CUMMINS. Now, then, if the shipper made the statement to the agent, if that part of it is true, then the liability would not attach?

Mr. WILLISTON. No liability would attach for failure of the goods to be what they were said to be, and no liability as to the kind or quality that they were said to be. One hundred boxes said to contain chickens, if they were said to contain chickens, no liability would attach because they were not chickens, but liability would attach if there were not 100 boxes.

Senator CUMMINS. I think I see the general idea that is intended to be conveyed.

Mr. WILLISTON. It was worked over very hard by several railroad attorneys and several other attorneys, and we thought we ultimately got a not very simple matter stated so that it meant what we intended.

Senator CUMMINS. You have, then, in every case practically a question of credibility between the railroad agent and the shipper to be determined by a court and jury.

Mr. WILLISTON. There may be that question arise. Of course, in many bills that would not arise at all.

Senator CUMMINS. I suppose there are a number of instances in which any troubles that arose would be very few as compared with the whole number of bills of lading issued.

Mr. WILLISTON. I mean in many forms of bills of lading it would not arise—if I have sufficiently met the question.

Senator CUMMINS. That is all. I wanted to be sure that I understood that part of it.

STATEMENT OF SOL WEXLER, OF NEW ORLEANS, LA., VICE PRESIDENT OF THE WHITNEY CENTRAL NATIONAL BANK.

Mr. WEXLER. Mr. Chairman and gentlemen, the primary object of this bill is to hold the railroads responsible for the acts of their own agent, whether this act arises from issuing a bill of lading without having received the goods, or issuing a bill of lading for a greater quantity of goods than were actually delivered to him, or for falsely describing the merchandise that was delivered to him.

The necessity for making the railroads liable for this is the fact that the bulk of the commerce of the country to-day, particularly the export commerce of the country, is done upon negotiable bills of lading. To make the matter perfectly clear to you, there are two dis-

tinct kinds of bills of lading. One is known as the "to order" bill of lading, which arises when a shipper in the interior sells a certain amount of commodity to a buyer at the port or abroad; he makes out a bill of lading to his own order—"notify"—giving the name then of the person to whom he has sold the commodity, so that the railroad will know who to notify when it arrives at its destination; and he enters his name on the back of the bill of lading, and it thereby becomes negotiable and is handled freely by banks throughout the United States and abroad.

The other class of bills of lading is the straight bill of lading, or the bill of lading where the consignee's name is mentioned in the bill of lading—that is, where the man consigns the goods to a certain firm or individual, and that firm or individual receives the notice direct from the railroad, and can obtain the goods without the surrender of the bill of lading at all.

The bulk of the business of the country, I should estimate—that the ratio or volume of one class of business to the other—is probably 75 per cent on "to order, notify" bills of lading in dollars and cents, as against 25 per cent on straight bills. For instance, all the grain that is shipped from the interior to elevators or abroad, all of the cotton, the packing house products, all of the steel rails, and nearly all of the agricultural products of the country are shipped on "to order, notify" bills of lading, because it would be impossible to finance this tremendous volume of business while these articles are in transit if negotiable instruments were not permitted, upon which money could be had in the interim. Foreign business is entirely done upon "to order, notify" bills of lading, and at the present time those bills of lading are more or less under discussion and under criticism, which makes it imperative that relief be had in the very near future in order that this tremendous commerce can continue to be carried on. The attention of the general public was called to this deficiency by cumulative frauds that have occurred during the past two or three years, which have created a feeling of unrest abroad, and relief is now being sought for in various rather impracticable ways in this country as well as abroad.

The protection, therefore, that I ask is simply that the bill of lading be given the same standing as any other negotiable document; that is, when it purports to be a receipt for the delivery of a certain quantity or kind of merchandise, that the person or firm, or representative of the person or firm, that signs that receipt is called upon to deliver that quantity and kind of merchandise. If the matter continues as at the present time, it is expected that banks abroad will decline to accept drafts drawn against the bills of lading such as are now put forth by the railroads. They have endeavored to put in a bureau in the city of New York for the purpose of validating bills of lading. They have endeavored to form insurance companies for insuring the banks against loss that may arise by reason of their having paid out money against bills of lading calling for merchandise receipted for by the authorized agent of a railroad that may never come forward and for which the railroad declines any liability.

I believe that the passage of this bill will do more toward facilitating the domestic and foreign commerce of the country than any bill that can possibly be passed at the present time. It will not only benefit the large shipper, but particularly benefit the small

shipper who gets his money immediately upon delivering his goods at the railroad station in order to buy more goods and continue to forward them to points where they can be sold. With the attitude at the present time of receivers of merchandise at all central points not to pay out any money upon drafts drawn against bills of lading for which no one is responsible, the bills at the present time have simply become pieces of paper without any responsibility attached to them, unless the receiver or the shipper can prove that the merchandise was actually delivered, which is a process that is more or less tedious, and which could only take place after the money had been paid out—it is very much feared that unless legislation of this kind is passed a great number of smaller shippers will be entirely put out of business and that the business will be congested in very much fewer hands.

Now, the operation of the business is about as follows, from a banking standpoint: A shipper of cotton at an interior point sells to Europe 100 bales of cotton—we will say to Liverpool. He gets a through bill of lading; that is, the bill of lading from this interior point—we will say Yazoo City, Miss., where Senator Williams lives—to Liverpool via New Orleans. The Illinois Central Railroad will receipt for that 100 bales of cotton and guarantee to deliver it to the order of the person shipping it in Liverpool.

The shipper then attaches to that bill of lading his draft for the value of this cotton. He then goes to his local bank and presents it, and this bank buys that bill of exchange if he is engaged in that line of business. If he is not engaged in that line of business, then the cotton merchant there may be compelled to send that bill of exchange to New Orleans or New York or somewhere else, but it takes identically the same course.

The bill is usually drawn—that is, the exchange is usually drawn at 90 days, and is drawn upon a bank or upon a spinner in England—we will say in Liverpool. Upon presentation it is accepted by the bank, and the bill of lading detached and held by the accepting bank. It then becomes a negotiable paper in England and can be discounted at the very lowest prevailing rates in that country.

The bill of lading is then surrendered by the accepting bank to the buyer of the cotton, who has opened a credit with him, and he waits with his bill of lading until the cotton arrives. If it arrives he presents his bill of lading. The steamship takes it up and delivers his cotton, and the transaction is closed and has turned out entirely satisfactory.

But let us presume that the agent at Yazoo has never received that hundred bales of cotton, but that he signed that bill of lading. The bank or cotton merchant holding the bill of lading in Liverpool has absolutely no recourse against the railroad, although he is the innocent holder of a thoroughly negotiable piece of paper. He has no means of knowing whether that cotton was really delivered to the agent or not. It is not for him to look as to whether or not it was delivered. It was simply for him to know whether or not this agent was the authorized agent of that corporation, and if he was, then he should have the right to recover from the principal of that agent.

Now the point may be raised that the railroad companies have thousands of agents scattered all over the country in remote sections, and they can not be expected to have such careful supervision of all

these agents. I do not feel that that is a fact. Nearly every agent of every railroad company is under bond to cover such responsibility as he may assume.

For instance, in the sale of tickets. If he sells a ticket without having received the money for it, and the money never gets into the pocket of the railroad company, the railroad must honor that ticket just the same.

If an agent through carelessness permits a lot of dry goods to be damaged by water or oil, or something of that kind, the railroad company can not deny liability for that damage because they did not hire him to put oil or water on this merchandise.

In other words, they are responsible for every act that agents commit at the present time except the act which arises from the signing of a bill of lading.

I believe that at the time the common law of England decided that a railroad was not responsible for the acts of its agents, that was at a period when the volume of business done upon bills of lading was very small, and when the business was properly confined to the shipper and the receiver directly, and there was very little of the negotiable or "to order" bill of lading business done.

In 1888, when Chief Justice Fuller decided this question, the volume of that class of business in this country was very limited, and bills of lading were not then, as they are now, one of the principal mediums of credit that exist in this country to-day.

In our own city, which is insignificant compared to the larger centers, and in our own bank, the Whitney Central National, where we handle over a million dollars a week of negotiable documents; that is, we loan on negotiable documents more than \$1,000,000 a week. What is the result? If we can not have this protection, if we can not feel that when we loan a man on a bill of lading that somebody is responsible for this commodity, we can not do this business with the degree of safety that it is imperative we should do. A charge would have to be levied for doing this business to cover the serious responsibility which we would be taking.

Who is at fault if a bill of lading is signed for and the goods are not delivered? Is the innocent holder of the document at fault? By no means. But the railroad company is at fault. If they have hired a man at \$40 a month at a point where the responsibility will justify a man at \$75 or \$100 a month, and that man, perhaps, by reason of his necessities, is tempted to do things he should not do, it is the railroad who should suffer and not the innocent holder of the document. The safeguarding by the railroad is by no means a difficult task. The railroad can audit the bills of lading of its agents in the same manner that it audits his tickets, his cash accounts, and in the same manner that the express companies and telegraph companies audit for this same agent, who usually acts in these several capacities. They can have negotiable bills of lading engraved if need be on safety paper, can prohibit the present careless use of pencil in writing and signing bills of lading, and what is more important can discharge and blacklist, which is not now done, the agent who dares to sign for articles before they are in his possession.

The business has heretofore been conducted very loosely. If these loose methods are eliminated and the same safeguards would surround the issuing of the bills of lading as now surround the sale of

Heretofore what happened? The railroads had quantities of bills of lading lying around their offices. When a man wanted bills of lading he could come into the railroad office and get a bunch of them and take them over to his own place, two or three hundred of them, if he saw fit. Then he would come over to the railroad agent, who lived in the same town with him, probably went to the same church with him, the children went to the same school, and he would say: "John, I need this money to-day, and I will have this stuff here to-morrow without fail. Sign this bill of lading up for me so that I can get the money." And Mr. Agent, a good fellow, believing the man would fulfill his promise and deliver the goods, signed the bill of lading; the man got his money; and the innocent holder is the loser for it.

That is the general effect upon commerce.

I can see no good reason why the agent of a railroad company, the same as the agent of any other corporation, should not be held responsible in exactly the same manner.

Now, referring to this "shippers' load and count," about which an inquiry has been made. There are certain commodities which are exclusively handled in that way. For instance, lumber. Where a railroad has a switch track into a sawmill it is customary for that mill to load its own lumber, and those waybills are signed "Shippers' load and count."

Similarly other commodities are loaded in the same way, and that is perfectly satisfactory to the shipper as well as to the railroad. Those documents are not handled with the same degree of negotiability and in the same manner as the full negotiable document is handled.

In other words, if we receive a "shipper's load and count document," we rely to a greater extent upon our knowledge of the individual who presents it and upon his financial standing than we do on the quantity of the goods covered by the bill of lading, because we know that there can be a variation. But the shippers' load and count is an insignificant part of the general shipping of this country.

There is exported from the United States—I can not give you the exact figures, but in cotton alone the exports this year will probably amount to \$600,000,000. Bear in mind that every dollar of that \$600,000,000 is shipped upon a negotiable bill of lading, and that somebody has to put out the money based upon their belief that that cotton was actually loaded and upon their faith that the general agents of all the railroads are honest, and that the exceptions only are dishonest. Otherwise the business would have come to a standstill long ago.

The profit arising from these transactions, particularly in foreign exchanges, is so small that there is a general reluctance at the present time to take even that very small chance which might arise of loss from the few agents who may be dishonest. As the railroad company derives freight from the time the agent signs the document until the freight is delivered, it seems to me that they should be the ones who should be held entirely responsible.

With regard to the "straight" bill of lading for merchandise, which is shipped direct to consignee, the small shipper is affected to a greater extent than "to order notify" bill of lading; and it is just as important that the railroad should be responsible for these as for the negotiable

bills of lading. The fact that the draft is drawn against the bill of lading does not give the payer of the draft the same security as he would derive from a "to order notify" bill of lading. But he has the evidence in his hand that the goods have been delivered to the railroad, and that the railroad company's receipt accompanies them. Therefore, based upon that, he pays out his money. If the goods are not delivered, he loses his money.

I maintain that the business of the world—not only of the United States, but of the whole world as it is done to-day—is done largely upon bills of lading, whether "to order" or "straight;" that it has become the most important instrument of credit in use in the world to-day of any kind, and that it is necessary for the commerce of this country to make that bill of lading fully negotiable, entirely safe, and to make the person who receipts for the goods, whether they have been delivered to him or not, responsible for their delivery.

Let us presume that an agent received from a shipper, say, 100 bales of a certain commodity, which might be moss, which is a commodity that is handled in the South, and the question of what was contained in those bales did not come up between the agent and the shipper at all. But the agent signed these bills of lading for 100 bales of cotton, instead of a hundred bales of moss, and the shipper in his hurry puts this bill of lading with his draft in an envelope, and forwards it to a bank and gets the money on it. Who has been at fault? Both of them to some extent; the shipper in being careless, but the agent also in being careless. A controversy might very well arise as to whether or not the agent was not equally culpable in his negligence in receipting for a commodity the contents of which he did not know and did not take the trouble to find out. But yet he stipulated it, and an innocent holder of the bill of lading is the sufferer from his carelessness.

I might give you a receipt for \$100, and have only received \$50, yet the receipt is binding upon me in the hands of an innocent third party.

All we are asking of this bill of lading is to protect the innocent holder of the document.

We are not asking for any protection whatever for the fraudulent holder of a document. We are not asking for any protection or immunity for the shipper or the agent if there is any fraud or conspiracy; but we are asking that if an agent emits over his signature a negotiable instrument which he well knows an innocent third party may suffer from, which he knows it can do, a loss arises out of his carelessness or dishonesty, that his principal should be held responsible for it. And that is what is intended to be covered in this bill.

The CHAIRMAN. Senator Cummins, you may inquire.

Senator CUMMINS. If bills of lading were issued under the proviso that I read a few minutes ago, would the banks be willing to accept them and negotiate them?

Mr. WEXLER. In some instances; not in all. It would require a better name—a firm or person in better standing—to obtain money upon a "shipper's load and count" bill of lading than it would upon one in which there were no restrictions.

Senator CUMMINS. I am not referring now to the "shipper's load and count" side of the proviso, but the other part.

Mr. WEXLER. Which part is that?

Senator CUMMINS (reading):

Provided, That if the property is described in the order or the straight bill of lading merely by a statement of marks or labels upon the property or upon packages containing them.

I will end there.

Mr. WEXLER. Yes; end there.

Senator CUMMINS. Would your bank be willing to discount or to pay out money upon a bill of lading that simply described the property by a statement of marks or labels upon the property or the packages containing it, without knowing anything more?

Mr. WEXLER. Yes, they would. I will instance that to you. For instance, suppose a man is in the wholesale grocery business and he has a shipment of a carload of canned goods from Baltimore. We know if that man is in the grocery business, when it is in his line of business, that he may buy canned goods. When he comes to us with the bill of lading for a thousand cases of oysters and that is signed by the railroad, all we want to know is that it is a thousand cases of oysters. We do not inquire, and are not concerned, whether it may be tomatoes or something else. That risk every man is willing to take upon his knowledge of the man with whom he is doing business.

But if the bill of lading came along without any number of boxes stated on it at all—in other words, a carload of tomatoes, for example—of course it would not be a negotiable document. No one would handle it. But we do not go into the question of whether these boxes are all full boxes or half boxes, or anything of that kind, because we know in a general way the character of the people with whom we do business.

Senator CUMMINS. I have not studied that provision very carefully. I have seen it for the first time this morning, but it seems to me to return you to about the same condition you are now in.

Mr. WEXLER. It would not, for this reason, if you will permit me. The greatest difficulty lies not in the fact that a smaller quantity is shipped, but these frauds are usually perpetrated when there is no shipment at all; or else they are perpetrated by the shipper, with the deliberate intent to defraud, who is not called upon at all to give the quantity.

For instance, there was a large fraud committed in Memphis about 15 years ago by a cotton house that had sold abroad good middling cotton, which is one of the higher grades, and they shipped, instead of that, linter's cotton, which is a very short cotton which comes from cotton seed and is worth about 20 per cent of what the other is worth; but the bill of lading called for so many bales of cotton, and these drafts were negotiated, and when the man abroad received the cotton it was a cotton which was vastly inferior in grade, of course. He sold it for what he could get for it, and he had to lose the difference. The railroads, however, were not in any sense responsible there, because they were not in any way in collusion with the shipper. They did not misstate the goods at all. They were not called upon to give the quality of the goods in any sense.

Cotton runs in grades all the way from strict low ordinary up to middling fair; that is a variation of about ten different grades, varying in price about 2 cents a pound. No bill of lading for cotton ever stipulates the grade, but it stipulates the number of bales and the weight. There are slight variations in the weight which are not held

against the railroads, because there is a shrinkage in price arising from drying out or a shrinkage in weight arising from absorption. But the number of bales must be there.

I maintain that if a railroad signs for 100 bales of cotton through its agent it must deliver 100 bales of cotton, because the whole fabric of credit would fall down if an innocent holder of a negotiable document could not recover from the person at fault. The whole credit system of the country would fall. There would be nothing left. No bank, no individual could do business if a negotiable instrument in which they deal—notes or bills of lading, drafts, etc.—if the person at fault, in the issue of a fraudulent one, can not be held liable to protect the innocent holder.

I am not a lawyer, but it appears to me that is a fundamental proposition that an innocent holder is entitled to protection against the man who has permitted it to be committed, whether through dishonesty or carelessness.

Senator CUMMINS. This proviso seems to embrace this proposition, that if the shipper says to a railroad company there are certain things in these packages or that these packages are of a certain weight or in a certain condition that if that statement is true—that is, if the shipper did make this statement—then there is no liability on the part of the railroad.

Mr. WEXLER. There would be no liability on the part of the railroad if the shipper misrepresented the contents of a package which the railroad was unable to discover.

For instance, if he brought a coop of chickens and described them to the agent as a coop of geese then the railroad agent has no right to receipt for a coop of geese when he sees the chickens in front of him. But if the shipper delivers a box of dry goods that is nailed up all around and asks the agent to receipt for one case of dry goods, then the railroad agent is held entirely free of all liability if he delivers that particular case which he receives. It is a common-sense transaction.

Senator CUMMINS. I do not want to be hypercritical about this.

Mr. WEXLER. I am very glad you are asking these questions, because that is the only way that we can get at the facts.

Senator CUMMINS. But it seems to me, the way it is drawn, if a shipper brought in a crate of geese and he said to the railroad agent that it was a crate of chickens that that would be the end of the thing so far as any liability was concerned.

Mr. WEXLER. It may have been defectively drawn.

Mr. WILLISTON. If the witness will permit me, I might say that the whole proviso depends on the first line of it, "*Provided*, That if the property is described in an order of a straight bill." The shipper's statements, except as put in the order or straight bill, do not make the least difference in the carrier's liability. Everything is dependent on the statements being part of the description in the bill.

Senator CUMMINS. It must be described in some fashion in the bill of lading?

Mr. WILLISTON. Yes; and that description must be true. The principle of the proviso and of the section on which it depends is just like the principles regarding labels under the pure-food law. You are entitled to what is stated on the label. If the statement on the bill of lading is a broad, indefinite one, or appears to be made entirely

on the word of the shipper, then the truth of such indefinite statements is all the holder of the document can demand. But no extrinsic statement between the shipper and the carrier has any effect on the matter.

Senator CUMMINS (reading):

Provided, That if the property is described in an order or straight bill of lading—

I will omit the first alternative, then [continues reading]—

described in an order or straight bill of lading merely by a statement that the property is said to be of a certain kind or quantity.

Said by whom to be and where to be?

Mr. WILLISTON. That in the bill of lading must necessarily mean by the shipper. A bill of lading is required to be in the common form which says: "Received of so and so the following property," and then follow the words of the description, "said to be of a certain kind or quantity." So the bill will read "Received of John Jones 100 barrels, said to be of a certain kind." That necessarily means said by the shipper from whom they were received.

Senator CUMMINS. Now, then, if it is true that the shipper said that these barrels were of a certain kind and quantity, then the carrier would not be liable?

Mr. WILLISTON. The carrier would not be liable if they were not of that kind or quantity. The question would be whether Mr. Wexler would care to buy a bill of lading or advance money on a bill of lading which was in that form. He would have the option. The document would state on its face just what it was. And all that the advocates of this bill request is that the railroads shall stand behind any statements that are made in the bills of lading. If they have made very few statements, then it is a question for those who buy such documents whether the paper is worth buying.

Senator CUMMINS. It would be easy, would it not, to formulate a bill much less lengthy, which would say, for instance, that the railroad company should be answerable for the statements actually made in the bills of lading?

Mr. WEXLER. That covers it. That absolutely covers it.

Mr. WILLISTON. That would be, it seems to me, true.

Senator CUMMINS. And then if it said: "Received of John Jones 100 barrels; we do not know what is in them or anything about them"—then, of course, there could be no liability on the part of the railroad. Or if it said, "Received of John Jones 100 bales of cotton; we do not know what kind of cotton or how much they weigh"—that would relieve the railroad, would it not?

Mr. WILLISTON. That is true. Only in view of the amount of litigation there has been in this matter, it seems to those who have drawn the bill, and to the railroad people who have criticized it, wiser to put in a little more specific statement, even at the risk of making a somewhat longer one.

The CHAIRMAN. Supposing the courts had taken that view and simply held the railroad company was liable for the statements, that would have cleared the whole thing?

Mr. WEXLER. Absolutely. If this decision in 1888 had never been rendered, we would be doing business in negotiable bills of lading like we are in negotiable notes and other forms of securities, which is what we want to do.

Senator CUMMINS. This would drive railroads to one thing. They would have to say: "Received such and such thing; contents unknown."

Mr. WEXLER. They do that frequently.

Senator CUMMINGS. That would be the bill of lading?

Mr. WEXLER. Yes, sir.

Senator CUMMINS. That would not help commerce very much?

Mr. WEXLER. Not at all. They would receipt for grain; so much grain. If it was cotton, they would say, "One hundred bales marked from 1 to 100." Or so many bales of hay, or so many cases of shoes. For instance, 100 cases of shoes, or 100 cases of dry goods.

All that we say is that the railroad should be responsible for what it signs. They can put any restriction they please on what they sign, so as not to make them liable for anything that is not palpable to their agent. They are entitled to that protection. They ought not to be held responsible for anything that they can not see or count. If the shipper wants to load his own stuff, it should be "shipper's load and count."

Senator OLIVER. As I understand the decisions of the courts—I am not entirely familiar with the decisions, but I understand the courts have decided that if an agent through collusion with the shipper signs a bill of lading deliverable to order, and that the railroad does not actually receive the goods, the railroad is not liable?

Mr. WEXLER. That is the idea.

Senator OLIVER. You want that condition remedied?

Mr. WEXLER. I want that condition remedied. The decision, I think, was that an agent is hired to receipt for goods, and that in signing a bill of lading for something which he has not received, it is an act of ultra vires, that he was not hired to do.

But if you give your note to me signed in blank and tell me, "Mr. Wexler, I will let you have this note, fill it out for a hundred dollars," and I fill it out for a thousand dollars, you would be liable for the thousand dollars if it were held by an innocent third party.

Senator OLIVER. I think I ought to be if I would be foolish enough to do a thing of that kind.

Mr. WEXLER. I think the railroads ought to, too.

Senator OLIVER. This would not protect the banker: even this legislation would not protect the banker in case of the existence of a forged bill of lading!

Mr. WEXLER. No, sir; it would not.

Senator OLIVER. You still run that risk?

Mr. WEXLER. Yes, sir; that risk has to be taken.

Senator OLIVER. And your theory is that if this present condition continues, it is going to hamper the carrying on of business, because you bankers will either have to decline to advance money on such bills of lading or will have to charge for the risk?

Mr. WEXLER. Yes, sir. I would like to give you an evidence of that fact here. A cotton merchant of Manchester sent us, through his brother, who is doing business in New Orleans, this document, which was handed in by the London City & Midland Bank, one of the largest banks in Europe, requiring him to have the exchange buyer in this country sign this document before they would agree to accept bills in London for him.

The clause is as follows:

We hereby guarantee to you and to each one of you severally that the said bill of lading is valid and genuine and has been signed by the agent duly authorized by the carriers therein named, and that at the time the bill of lading was issued the cotton therein referred to was in the actual custody or under the control of the issuing carriers.

Now, this bank wants to say that unless the buyers of the exchange of this gentleman are willing to sign this document guaranteeing that the cotton was in the custody of the railroad at the time they signed it they will not accept his bills of lading over there.

That shows you the attitude of the foreign bankers. I do not entirely blame them, however. They are paying out millions and millions of dollars upon what they believe to be commodities, but which may not be.

Senator OLIVER. As it stands now, if one of these fictitious bills of lading, or bills of lading based upon no shipment—if you advance the money upon it and send it to a London banker and he accepts it, that relieves you and throws the responsibility upon him?

Mr. WEXLER. Yes, sir.

Senator OLIVER. And his purpose there is to hold you to your responsibility in the case?

Mr. WEXLER. Precisely.

Senator OLIVER. I think he is right.

Mr. WEXLER. But we won't stand for it.

Here is the point: If the draft is made "pay to order" for, say, £5,000 without any reference to the bill of lading, and we buy that draft and send it on, we are not responsible. But if it says on it, "against 100 bales of cotton; bill of lading attached," then the courts hold we are responsible, because we have bought it with the stipulation that there are 100 bales of cotton behind it. So that, since we have had all these troubles through the failures of these two large firms in the South, we have eliminated these notations on the draft entirely and the foreign banker really has to bear the brunt of it. There are reasons why he should, but they are not pertinent here.

The CHAIRMAN. I do not wholly understand the course of the business. If a man comes to his local banker with a bill of lading, the banker gives him credit and issues a draft, does he not?

Mr. WEXLER. No; there are several ways of doing it.

The CHAIRMAN. Let us start first with the shipper. How does he get his money?

Mr. WEXLER. The shipper either has sold his cotton abroad or in this country. If he has sold it abroad, he gets a through bill of lading to the point at which he has sold it, and he attaches his draft and insurance policy to it, and he sells that bill of exchange outright at the prevailing rate of pounds sterling or francs or marks or whatever it may be.

The CHAIRMAN. He sells to the local banker?

Mr. WEXLER. He sells to the local banker.

The CHAIRMAN. Now, it becomes the property of the local banker?

Mr. WEXLER. Yes, sir.

The CHAIRMAN. How does the local banker realize on it without escaping the liability on it?

Mr. WEXLER. These bills are usually drawn at 90 days' sight; they are not sight drafts. We give credit in America to Europe for cotton, based upon the acceptance of the 90 days bill of exchange by a

responsible foreign banker, spinner, or cotton merchant; our responsibility continues until the acceptance is effectuated. It then ceases and the bill of lading becomes the property of the accepting bank for account of his customer or of the accepting cotton merchant or spinner for his own account. If the cotton fails to arrive or if the bill of lading is a forgery the acceptor must stand the loss.

The CHAIRMAN. And you escape liability?

Mr. WEXLER. I escape liability absolutely. I am through. I have bought that bill based upon the fact that a credit has been opened in Europe for it.

The CHAIRMAN. And you have practically sold the bill, have you not?

Mr. WEXLER. No, sir; I have not sold it. I still own it. I have it accepted now, so I have a good piece of paper. I have indorsed the bill itself, but I have not indorsed the bill of lading, you understand. So what have I got? I have a draft by a firm in America in favor of himself, by him indorsed, and accepted by a foreign bank that is solvent and indorsed by our bank. That is sold in London to the open discount market and the bill of lading that went behind it is delivered by the accepting bank to the person who opened the credit with them, the mill.

The CHAIRMAN. And your indorsement does not carry any liability?

Mr. WEXLER. Our indorsement does not carry any liability unless the bank fails that accepted it. Then it comes back on me and I go back on the man in this country who drew it. That is the method.

There being no further questions, Mr. Wexler was thereupon excused.

STATEMENT OF PHELAN BEALE, NO. 2 WALL STREET, NEW YORK CITY; LAWYER, REPRESENTING THE GERMAN COTTON EXCHANGE OF BREMEN, AND CERTAIN MEMBERS OF THE NEW YORK COTTON EXCHANGE.

Mr. BEALE. Mr. Chairman and gentlemen, Mr. Wexler has presented the argument that I had in mind so ably that I am not going to trespass on the good nature of the committee by consuming its time. I shall pass very lightly over the three points that I intend to make and merely spend awhile on point 2.

If the committee please, the situation is this: The Supreme Court of the United States in *Friedlander v. Texas Railway* has decided that a railroad carrier is not liable for cotton—rather cotton in that case, but generally as to all commodities—is not liable on a bill of lading signed by its agent, unless the goods have actually been received by the agent. I, on my part, have no connection whatever with the bankers' committee. I appear solely for the consignees, who are in reality the shippers, because both in reality and figuratively the consignees pay the freight, in that they buy the draft with the bill of lading attached at the end, which includes the freight charges. As a representative of those interests, I would deem it impertinent if I were to come before the committee and argue that the committee should change a ruling of the Supreme Court of the United States without offering sufficient reason therefor. It is immaterial, in my humble opinion, whether Mr. Dowie has lost \$40,000, or 400 cases of

eggs, or what not, unless those losses bear generally on the situation, because a mere loss, an isolated loss, does not prove that the decision is bad.

So I come before the committee and base my earnest request that the committee report this legislation favorably on three general points, the first point being the substantial injustice of the situation as it now stands. The second point is, assuming that the decision is just, the abuse by the railroads has been such that it is the duty of the Senate and of Congress to remedy the evil as it now exists; and the third point is that it is a question of greater importance than whether the railroads dislike or like the proposed legislation; that the third point is that the volume of trade and the facilitation of the commerce of the United States, both within its own borders and with foreign countries, render it imperative that some action be taken to encourage the same by protective legislation.

Now, gentlemen, to return to point 1—the substantial injustice. Ex-Senator Faulkner represents the railroad, and also Col. Thom, for whom I have a great esteem and affection, and I am sorry he is not here to reply. I defy Col. Thom or Senator Faulkner to cite a particular instance where a discrimination is made in favor of a corporation or a firm or an individual to the extent that the Supreme Court has discriminated in favor of the railroads in rendering their decision in the case of Friedlander against the Texas Railway. Do you mean to tell me that there is any corporation or firm or individual who employs an agent and holds that agent out as having a general power to issue certain documents and that agent issues a document without receiving the goods—do you suppose that any principal would be absolved from liability? Certainly not. It violates all the rules of reason in the law of agency, as well as, with due deference to the Supreme Court, common sense.

In seeking for a motive for the decision of the Supreme Court in the Friedlander case, I ask why do you suppose the Supreme Court reached that conclusion? Frequently the appellate courts, so as to reach a certain conclusion by an orderly reasoning of law, distort a principle of law on the grounds of public policy. We know that the railroads developed the United States. We know that they are deserving of a certain amount of protection. The Supreme Court of the United States undoubtedly thought that a large railway system, maintaining anywhere from 1,000 to 3,000 or 4,000 railway agents, deserved protection; that it would be against public policy to place within the power of a \$40 or \$50 a month freight agent, a man of small caliber by reason of his unimportant position, to bind the railroad; that it would be unfair to retard the development of the United States and to place within the power of that freight agent practically to bankrupt a railroad by collusion with some third party by issuing fictitious bills of lading without first having received the goods discounted.

Now, assuming that that was the view of the Supreme Court in order to protect the railroads for the development of the United States, do you suppose that the Supreme Court ever intended or had the remotest idea that the protection which it gave to the railroads by that decision would be turned into a license and privilege—verily turned into a license and privilege by continued and constant abuses on the part of the railroads, so that the railroads now say to their

agents, either expressly or tacitly, "You go right ahead and issue fictitious bills of lading, if you please, just so you get the business from shippers. We are not liable anyhow, and we do not have to pay the bill if anything is wrong; so, for the sake of business, you go ahead and continue that practice."

I pass on to point 2, the abuse by railroads of the Supreme Court's decision—and again I regret that Col. Thom is not here. I would like to ask Senator Faulkner or Col. Thom whether they deny that the issuing of fictitious bills of lading is the practice of the railroads, and whether they would deny that the protection afforded by the Supreme Court of the United States has not been brutally abused by the railroads.

An isolated instance seldom if ever proves the rule; therefore I would like to explain to the committee the general way in which the railroads abuse this privilege. I shall not go into it at great length, but will just mention two instances.

Take the cotton situation, with which I am more familiar. At or about every 5-mile interval on a railroad line in the cotton section there is a little station. Around that station is clustered plantations of large and small size. As stated, there is a distance of 5 miles between stations. So you practically have a circle with a diameter of 10 miles, composed of cotton plantations. The cotton generally is ready for the market in the early fall, and you have a large amount of it on hand in the months of October and November. The cotton is ready for shipment. I as a plantation owner go to the railway agent and say, "John," as Mr. Wexler says, a boyhood companion, or he knows who I am, "you know that my plantation usually raises about 1,000 bales of cotton a year. You know that in the month of November, the first of November, I always have two or three hundred bales for shipment. You have not the cars ready for the cotton; there is so much damage and shrinkage if left exposed on your station, and you have not the quarters to store it or the facilities to ship the cotton, I am losing the interest on my money. Why not give me a bill of lading, so that I can take the bill of lading and negotiate it and secure the use of my money now, and I will keep the cotton on my plantation until you are ready for it and thus save you the responsibility of looking after the cotton, and when you get your cars I will deliver the cotton to you for shipment, and then, in the possession of the bill of lading which you will give me, I can go ahead and use my money as of to-day." The railway agent refuses. There is another road 5 or 6 miles away. I promptly respond, and say: "Very well; you refuse a reasonable request. I will give my freight patronage to the L. & N. Railway, 5 or 6 miles away." The business falls off at John's station. The agent is summoned by the railway authorities to know the reason why. He can not explain it; or if he does explain it, the natural conclusion is that they say to him, "You get the business or there will be no necessity for this station continuing to exist there, and you will be out of a job." The railway knows it is under no liability.

If anything goes wrong by reason of the bills of lading that are issued by the railway agent, John, at my request, let us say, that if he issues a bill of lading and I deliver my cotton to another railway and negotiate the former bill of lading, the railroad is not liable. So is it not a reasonable inference that the railroad will say, "You get

the business"; and John, the railway agent, goes out and says yes, and thereby opens an avenue of fraud. Yet to this committee rushes the railroad companies and say, "We ought not to be liable, in spite of the fact that we have grossly abused the protection which the Supreme Court of the United States confided in us in the decision in the Friedlander case."

Just one step further—the warehousemen. In large cities all the railroads—in the city of Montgomery, Ala., I will take as an instance, because I am more familiar with that; it has 10 or 11 railways. Every railroad has a soliciting freight agent. The factor or warehouseman sells 1,000 or 10,000 bales of cotton to be shipped abroad. He goes to a soliciting freight agent and says: "I have an order for 1,000 bales of cotton, or 10,000 bales, whichever it may be; I have not got it made up but will have it made up in a few days. Give me a bill of lading now, will you, because it takes about 15 or 20 days for that bill of lading to go across, and I will have the cotton in a few days and deliver it to you." The railway agent replies: "No; I will not assent to a plan like that. You may thereby cause loss and defraud some man who is an innocent purchaser." The soliciting freight agent does not get any business, as the other agents acquiesce in the request. Do you suppose the headquarters of the railway is not going to say to the soliciting freight agent: "Why do you not get the business?" If he explains why, do you think the railway company will say, "No; do not obey the request, even though we are not liable; do not do it. We would rather lose money than have you do something that would possibly defraud a third party."

No, sir; I maintain that it is not ordinary common sense to infer that a railway company is going to act in that fashion, and I do not think ex-Senator Faulkner, the railways' attorney, will assert that the railroads are so charitable as that. I assert that the railways act just to the contrary. I am not going to weary the committee by bringing a lot of data to prove that, but I merely want to show you as to Col. Thom's railway exactly how it is worked. There is a firm of H. Hentz & Co., of New York, that I represent. H. Hentz & Co. had an offer by telegraph from people that they had dealt with previously thereto and who had been honest to sell Hentz & Co. some cotton at a certain price. The wire said, "I will sell you 2,000 bales at the market price. Will you take it?" Hentz & Co. wired back, "Ship it; bills of lading to order, notify; attach ladings to sight drafts. We will pay on presentation."

The bills of lading with drafts attached came in due course through banking channels and were presented and \$135,000 was paid for the drafts on the strength of the bills of lading. The shipments thus represented were divided into four lots—one lot over the Louisville & Nashville Co. from Decatur, Ala.; one lot over the Southern Railway from Decatur, Ala.—Col. Thom's road; one lot from Selma, Ala., over the L. & N. Railway; and one lot over the Southern Railroad from Selma, the two points being 300 miles apart, so we have four railway agents in two different towns being concerned.

Hentz & Co. wired to the four railway agents—they first wrote a letter and said, "We hold bills of lading signed by you, dated so-and-so, from such-and-such a city, for so many bales of cotton, marked 'P' or 'L,' of a certain weight," as the case was. Could there be any clearer or better identification than that? They addressed four

letters to four railway agents. Not getting a reply, Hentz & Co wired and said, "We want to know whether you signed the bills of lading. What about the cotton?" Those railway agents could hardly have been in collusion at the time because, as I have said, they were 300 miles apart, and yet each one of those railway agents wired—I have the record here of testimony under oath to corroborate my statement should it be questioned by Col. Thom or Senator Faulkner; I will not offer the record in evidence, but merely state for the sake of brevity what the record shows; each one of those railway agents wired—"Your cotton went forward to-day via the Potomac Yards." Hentz & Co. were not suspicious. Why should they have been? The replies were from authorized agents of the railroads. They did not know there was "a nigger in the woodpile," about the telegram. It subsequently developed that the cotton was not in possession of any of the railway agents. It was not in the possession of a single railway agent, and when a telegram was sent by each one of them to the effect that the cotton was under way it was an unqualified falsehood. When—in the trial of the case in the civil courts, not against the railroads, because, by virtue of the United States Supreme Court's decision, we had no case against the railroads—the question was put to the agents, "Why did you send that telegram?" "Well, we do not know." Then was asked, "As a matter of fact, you had not received the cotton and it was not under way?" "No." "Then the telegram that you sent was an unqualified falsehood?" "Yes."

Those railroad agents are still in the employ of the railways to-day, which, to my mind, is a significant fact.

I merely cite the foregoing as an evidence of the abuse on the part of the railways. I will also cite the L. & N. Railroad case. Mr. Bywater is the general foreign freight agent, a man of authority and superior position. I have here the testimony of a case tried in the South, of a man, John W. Knight, who was indicted by the Government. The letters of Mr. Bywater offered in the said case show that he authorized and ratified this issuing of the false bills of lading on the part of the railway agents, which caused tremendous losses to innocent parties.

Gentlemen, I maintain that the decision of the Supreme Court should be remedied by Congress because of its manifest injustice and its manifest discrimination in favor of railways to the detriment of the commerce of the United States; furthermore, that the railroads have so abused the protection afforded by this decision and turned the protection of the Supreme Court into a license to defraud the consignees in order to procure business and at the expense of the commerce of the United States, and have approved of a plan of dealing which resulted in the perpetration of grave frauds for the purpose of their own profit. It is a mistake to call the fictitious bills of lading accommodation bills of lading; they ought to be called accommodation bills of lading for the profit of the railroads; that it is presumptuous for the railroads to oppose the passage of a measure to make them answerable for their acts.

To proceed to point 3. I maintain, with all due deference to this committee, that it is the duty of the Congress of the United States not to consider any particular interest when it comes to the consideration of the commerce of this country—of the marketing of the crops, hides, corn, grain, cotton, and other crops—but it is their duty to

pass legislation that will protect the people in dealing among themselves and the foreigners who come to us to trade; protect them as soon as possible by passing an act that will at least impose upon the railroads the same legal obligation that an individual and a corporation to-day under the law are compelled to bear.

I appear here on behalf particularly of the German cotton merchants. As Mr. Wexler has stated, \$600,000,000 a year in cotton alone is purchased by foreign merchants, \$150,000,000 of which each year goes to Germany. The Germans appear here and they petition and respectfully ask that the Congress of the United States be good enough to pass legislation that will protect them in trading with the United States. They make no threats. It would be idle for them to do so. They have got to come to the United States to get the cotton. They can not get it anywhere else. They petition in the same manner the United States goes to Germany and asks that certain provisions, certain requirements of the potash situation, be remedied so that it will be of some avail to the potash purchasers of the United States. The German merchants come here and petition and pray that at least a reasonable safeguard be thrown around the trade, and that the railway companies be made responsible for the bill of lading signed by their agents.

Mr. Chairman and gentlemen of the committee, in conclusion, I merely submit this, that the Stevens bill as it now stands has no provision to protect the foreign purchaser. In the bill that Prof. Williston and Mr. Peyton presented it has in italics that the provision be extended to any place within the United States or to a foreign country, and in considering the bill I respectfully ask the committee that they be good enough to consider the supplication of the foreign merchants that they be protected to that extent.

Just one word more as to a criminal provision in the bill. It is a peculiar situation about the crime involved in forging a bill of lading. Some States protect against such an act by making it a crime, but I think that there ought to be a criminal provision added that anyone who forges or negotiates, or utters a forged bill of lading knowingly, shall be guilty of crime and punishable by imprisonment and fine.

The railways object, I understand, to its being made a criminal penalty if the agent does it, because they maintain that some of the railways in Chicago have such confidence in the house of Marshall Field and other houses there, that they give these so-called accommodation bills of lading, and if a penalty is imposed it will prevent them from doing this. It is not so necessary that the crime be placed upon the agent, because if you have a civil liability of the railway, then you do not especially care about the criminal liability of the agent, but where you are protected by the criminal liability is in the event of a third party who, without connivance, collusion, or any relation whatsoever with the agent of the railway, a third party forges a bill of lading and negotiates it. The criminal provision making such an act punishable by the United States courts will be something of a deterrent to a third person committing such crimes. I do not know what Prof. Williston may think of my statement of the law, but I ask, in the absence of a special statute, wherein is a crime committed? If I forge a bill of lading in Alabama to-day and secure \$100,000 from a man in Germany, what crime have I

committed? I have not committed forgery in the absence of a statute, because forgery at common law is forging the name of another to his financial detriment.

Senator POMERENE. Have they not State statutes covering that proposition?

Mr. FAULKNER. Yes.

Mr. BEALE. I beg to differ. All the States do not have that provision. There are an exceptionally few that have it.

Mr. FAULKNER. I do not know any that have not.

Mr. BEALE. I am sorry that I have not got them compiled, but just to continue, I am not guilty of forgery. A forgery is the unauthorized writing of one's name to his financial detriment. The agent does not suffer financial detriment. The railroad does not suffer. Wherein is the crime committed? You get the money in Germany and you are in Alabama, and you are not in the venue where the crime has been committed. It is very much like a man standing on a street in one State killing a man in another State. Wherein is the crime committed? In what jurisdiction. So, in the absence of a statute, the criminal escapes.

I trust that the committee will consider this criminal amendment when it comes to the consideration of the bill.

I am very much obliged to you, gentlemen.

Mr. Beale was thereupon excused.

STATEMENT OF FRANCIS B. JAMES, OF CINCINNATI, OHIO, AND WASHINGTON, D. C.

Mr. JAMES. Mr. Chairman and gentlemen of the Committee on Interstate and Foreign Commerce, a short statement will be submitted in support of the Pomerene bill, No. 4713, relating to bills of lading in commerce with foreign nations and among the several States—a bill similar to one that probably interested Senator Pomerene when he was presiding officer of the Ohio senate. The Ohio bill pertaining to bills of lading in intrastate commerce was framed by the commissioners on uniform State laws in national conference and is now the law of Illinois, Iowa, Massachusetts, Maryland, Michigan, New York, Ohio, and Pennsylvania, and one other State whose name I do not recall—nine States in all.

While the Clapp-Stevens bills meet my hearty commendation as far as they go, yet they do not fully safeguard the use of bills of lading as instruments of national and international commerce, and fail to fully define the rights, duties, and obligations of each and all persons brought into privity with such instruments. Mr. Wexler, in the speech he has just delivered, has well defined these matters, and the Pomerene bill distinctly covers each of the points dwelt on by Mr. Wexler, while the Clapp-Stevens bills do not. The Pomerene bill is the first comprehensive measure dealing with these instruments of national and international trade and commerce that has yet been brought to the attention of Congress. It deals frankly, openly, squarely, and directly with the problems, calls things by their well-recognized commercial names, and seeks to accomplish its purposes directly by providing, as by way of illustration, for negotiability by calling an order bill negotiable, and not indirectly under the guise of estoppel.

In this connection, attention is called to the annual message of President Taft, on December 6, 1910, to the third session of the Sixty-first Congress, wherein he said (Government Printing Office pamphlet, pp. 83-84):

For the protection of our own people and the preservation of our credit in foreign trade, I urge upon Congress the immediate enactment of a law under which one who, in good faith, advances money or credit upon a bill of lading issued by a common carrier upon an interstate or foreign shipment can hold the carrier liable for the value of the goods described in the bill, at the valuation specified in the bill, at least to the extent of the advances made in reliance upon it. Such liability exists under the laws of many of the States.

In previous discussions of a former Stevens bill and which did not pertain to foreign commerce, and which did not contain the numerous supplementary and amendatory matters offered here to-day on behalf of the bankers, counsel for the carriers pointed out that the Stevens bill was defective because of its failure to contain the provisions which are now found in the Pomerene bill and which follow a national and international bill of lading through its various devolutions from its inception to its discharge to its logical conclusion. This in brief is the substantial difference between the Clapp-Stevens bills and the Pomerene bill.

It would seem natural that a member of this committee before signing his name to a report on the subject under discussion would ask and answer five questions:

To what extent are bills of lading in use?

Do they possess any economic advantage?

Are there any evils to be corrected?

Is the measure constitutional?

Is the remedy a safe and tried one or a mere experiment?

These will be taken up briefly. To what extent are bills of lading used? In a hearing before the Interstate Commerce Commission which took place about three years ago it was testified that there were annually issued in American commerce bills of lading representing commodities of the value of \$25,000,000,000, including both order and straight bills of lading. It was then estimated that \$5,000,000,000 in cash were advanced annually by the banks on order bills of lading. Approximately 99 per cent of the tonnage and values of commodities covered by these bills of lading were involved in interstate and foreign commerce and not over 1 per cent in intrastate commerce. This ought to commend bills of lading as a proper subject upon which the national central legislative body—Congress—should exercise completely, exhaustively, definitely, and to its fullest extent the power conferred upon it by the Constitution to regulate interstate and foreign commerce.

What Mr. Wexler testified to from his personal observations is more than corroborated, explained, elucidated, and applied by numerous economic writers, a few of which will be referred to.

President Hadley, of Yale University, in his classic on Railroad Transportation, has well said (pp. 18-19):

We no longer produce for the home market, but for the world's markets. It is by the world's supply and demand that prices are made. The development of transportation has been the main instrument of this change. It has gone hand in hand with the extension of the credit system; each has supplemented the other. The bill of lading is made to serve the same purpose as the bill of exchange.

Mr. Albert Strauss, of Messrs. J. & W. Seligman & Co., in a recent address on the currency problem (p. 76), has elucidated the great utility of an order bill of lading accompanying a draft in the export of cotton, as follows:

The English buyer arranges with his banker to accept the drafts of the American cotton dealer, and notifies the American dealer to draw his 60-day bill on the London bank, with shipping documents attached. The American cotton dealer borrows from his local bank to buy cotton from the farmer, whom he pays in cash. When he has gathered enough cotton for shipment, he ships on, through bills of lading, from his southern home direct to Liverpool. These bills of lading he attaches to his 60-day draft on London, and the London draft, with its documents, he attaches to a draft on his New York agent. With this New York draft he repays the local bank. The New York agent, in turn, sells this 60-day bill on London to a New York banker, and with the proceeds meets the cotton dealer's draft on him. On the other hand, the exchange banker sends the 60-day bill to London for discount, and against the proceeds draws a demand bill on London.

Mr. Logan McPherson, in *Railroad Freight Rates in Relation to the Industry and Commerce of the United States*, after classifying order bills of lading as commercial paper, says (p. 190):

The [order] bill of lading is an instrument for facilitating commerce the importance of which is not generally known. It is not only a certificate that merchandise is in transit, but a first lien upon that merchandise; in a way a title to ownership, and, as fulfilling this function, negotiable. For example, a grain dealer buying a carload of wheat at the western field may, and in the vast majority of cases does, deposit the bill of lading covering that car in a bank as security for a loan to its value. If that car goes through to a port where it is sold for export, the loan may not be paid and the bill of lading lifted until the grain is transferred from the car to the vessel. There is a similar procedure in the case of other commodities, with the bills of lading covering raw material to the factory and finished produce from the factory. The [order] bill of lading thus contributes to that fluidity of the circulating medium, that celerity in the transfer of merchandise, which are striking achievements and essential requirements of current civilization.

In *Prendergast on Credit and Its Uses* [1906], page 42, the problem is thus stated:

A merchant having purchased a bill of goods on a specified term of credit, gives to the seller a bill of exchange, drawn on himself, representing the amount of the invoice. The seller, needing money for his own business, passes this bill of exchange, with his indorsement thereon, to another from whom he has made a purchase, or to whom he may be in debt for any other reason. The third person to whom the bill of exchange is given passes it on again in liquidation of an indebtedness of his own, and so on. In this way that bill of exchange may serve in the effacement of many different accounts and return to the drawer literally covered with indorsements. What is true as to the function of a medium of exchange, which the particular bill referred to has discharged, may be equally true of many other forms of credit instruments which may be called to mind. Promissory notes, drafts, checks, bills of lading, and warehouse receipts are all credit instruments which can be used as mediums of exchange or substitutes for money.

In the *Life Story of J. P. Morgan*, by Carl Hovey, just published, at page 41, the same thought as expressed by Mr. Strauss is given, as follows:

When we export cotton, a credit is opened with the English buyer, who arranges with his banker to accept drafts of the American dealer, and notifies the American cotton dealer to draw his 60-day bill on the London bank with shipping documents attached. The New York banker buys this bill of the dealer, thus supplying him, without trouble and at a small charge, the necessary cash to pay the farmer who raised the cotton. The dealer in exchange brings together a customer in London, or it may be in Batavia, Siam, or the coast of Africa, and a seller in the United States. The two practically stand in front of his desk and receive what is justly due them, although they may actually be 10,000 miles apart.

A word might be added as to the standing of these various authorities:

President Hadley gave to the world his book in 1886, one year before the Interstate Commerce Commission was appointed, and it is still a classic on its subject. His sound and sane views were recognized recently when President Taft appointed him a member of the Stock and Bond Commission.

Mr. Albert Strauss has an international reputation as an authority on foreign exchange and takes a great interest in public questions. His family has a high reputation for ability and integrity and for patriotic public interest, his brother being recently associated with President Hadley on the Stock and Bond Commission.

Mr. Logan McPherson, in addition to being the author of the work just quoted, is also the author of "The working of the railroads," "Transportation in Europe," and is now at the head of the economic bureau maintained by all the railroads in the United States. He was at one time lecturer on transportation at the Johns Hopkins University and at one time in the employ of the Southern Railway.

Mr. Prendergast is a high authority on credits and is now comptroller of the city of New York.

Mr. J. P. Morgan's name is a household word, and that he is a master banker goes without saying.

It should be noted that there is some difference in the marketing abroad of the staple commodity cotton and other staple commodities, such as grain. Cotton moves on a through bill of lading from an interior American point, rail and ocean, to the foreign port of destination, while other staple commodities, such as grain, move to the port usually under an interstate bill of lading, which is there surrendered and an ocean bill of lading issued in lieu thereof. This is a difference, however, of detail and not of substance.

As pointed out by Mr. Wexler, as set forth in the economic authorities cited, and, as contained in the express language of the provisions of the Pomerene bill as actually recognizing actual commercial practice, an order bill of lading, duly indorsed, is usually accompanied by a draft. An order bill of lading is commodity currency and is doubly so when accompanied by a draft—the draft with its dollar mark representing a unit of value and the order bill of lading a unit of quantity. By the use of a negotiable order bill of lading, properly protected by legal sanction, our great staple and other commodities are turned into a part of the asset currency of the country.

The use of the order bill of lading has dispensed with the necessity of the large concentration of money to handle and move the staple commodities of the country and enables a man with small capital to participate in the movement of our crops.

This may be illustrated by a small grain dealer in Iowa with a small cash capital. With this small amount of cash he buys up grain and concentrates it in his small elevator to the amount of \$10,000, which is the cash capital on which he is doing business. He ships this grain to the seaboard on an order bill of lading which he attaches to a draft which he draws on his customer. The bank passes this to his credit and with the proceeds of the draft he again buys up grain and continues this process so that with the \$10,000 cash capital he is enabled to do several hundred thousand dollars' worth of business. He thus multiplies the purchasing power of his \$10,000 cash capital through

an interstate instrument of credit up to the full margin of commercial safety. This economic advantage which thus enabled the small dealer to command a large credit has been frequently emphasized by western courts in giving full force and effect to State statutes making order bills of lading negotiable. In other words, the courts have recognized the underlying economic principles which prompted this character of legislation.

As you throw legal safeguards about these shipping documents, you facilitate their negotiability and multiply their credit power.

What has been said about these instruments of credit as applicable to staple commodities is equally applicable to the products of our industrial plants.

Are there any evils to be corrected? The greatest evil to be corrected is the uncertainty of the law governing bills of lading and defining the rights, duties, and obligations of persons brought into privity therewith.

Some of the specific evils sought to be corrected are as follows:

Prevention of confusion and a clear demarcation between straight bills of lading and order bills of lading by sections 1, 4, and 5 of the Pomerene bill.

Full recognition of the negotiable character of an order bill of lading by sections 31 and sections 24, 26, and 53 of the Pomerene bill.

Prevention of alterations of a straight bill of lading into an order bill of lading by section 2 of the Pomerene bill.

Prevention of a person being misled into taking a straight bill of lading for an order bill of lading by section 8 of the Pomerene bill.

The breaking up of the practice of issuing order bills of lading in sets, with a few necessary exceptions, by sections 6, 7, and 8 of the Pomerene bill.

A remedy to meet the case of lost or destroyed bills of lading by section 17 of the Pomerene bill.

Protection against spent bills of lading by sections 14 and 15 of the Pomerene bill.

The restoration of the law of agency so as to make the carrier liable for accommodation and fraudulent bills by section 23 of the Pomerene bill.

The Pomerene bill specifically and in the language of trade and commerce—the language of the law merchant, the language adopted by the courts—specifically deals with each of these subjects directly and not by indirection. The language used is no experiment, but the precise language of the act to make uniform the laws of the various States made applicable to interstate and foreign commerce.

As the provision restoring the law of agency has been the subject of most of the discussion—being section 23 of the Pomerene bill, and section 4 with the amendment suggested this morning to section 4 of the Clapp-Stevens bills—has been the subject of much of the discussion, attention will be called thereto. It is probable some of the misapprehensions as to the italicized matter suggested this morning as an amendment and supplement to the Clapp-Stevens bills arises from the fact that this italicized matter is taken from the Pomerene bill, but the context to which it refers in section 2 of the Pomerene bill is not contained in the Clapp-Stevens bills either in original form or in the form of the suggested amendment.

Section 2 of the Pomerene bill provides what must be embodied in a bill of lading, and, as will be seen on page 2, lines 6 to 8, that section 2 provides that the bill shall contain "a description of the goods or of the package containing them, which may, however, be in such general terms as are referred to in section 23." It is then necessary to turn to section 23 for a full elucidation of this subject.

In view of what has been said, a full discussion of section 23 of the Pomerene bill would be superfluous, but it should be supplemented in part, which may probably throw a new light upon the subject.

On February 20, 1851, a mere common pleas court of England in the case of *Grant v. Norway* (10 Common Bench Reports, 665) decided that where the master of a vessel issued a bill of lading without receiving the goods that the principal was not bound. It must be remembered that this case was decided at a time when there were but few railroads in England, its commerce largely by sea, the hauls were short and largely by canal. The court in this case rather dogmatically reached its conclusion without a full discussion of the doctrine of agency or without giving any strong reasons for making an exception thereto. Why the case was not carried to the House of Lords will never be known. The litigant may have been without funds, or it may have been compromised, and if the carrier were prudent it could well afford to have compromised and paid 10 times the amount of the claim as a good price for such a decision. The English merchants—that is, the general public—appealed to the English Parliament, and in 1854 secured an act which gave some relief from this decision.

One of the other speakers referred to the fact that the Supreme Court of the United States announced the same doctrine in 1886, and that this was the beginning of the trouble. The trouble began before that time, because the Supreme Court of the United States in 1855 in the case of *Freeman v. Howard* (18 How., 182) blindly followed the English common pleas court case of *Grant v. Norway* just referred to. Under the doctrine *stare decisis* the Supreme Court of the United States has repeated the error which first found its place in American jurisprudence in 1855 in the case of *Freeman v. Hoard*, just referred to, without entering into any reexamination of the question.

Mr. Wexler in his address has said that conditions have changed since 1886. It will be more apt to point out that conditions have materially changed since 1855, the date when the erroneous doctrine of *Grant v. Norway* found its way into the Federal decisions.

In 1855 there were but 18,375 miles of railroad in the United States, while in 1910 there were 242,107 miles.

In 1855 the State of Michigan completed an improvement of the Sault Ste. Marie Canal, and as late as 1870 the tonnage amounted to but 540,000 short tons per year, which in 1910 had grown to 62,363,218 short tons for a single year.

There is other Great Lakes tonnage from other ports constituting interstate commerce, and a large volume of coastwise trade constituting interstate commerce many hundred times to-day what it was in 1855.

In 1855 the great internal river waterways were unimproved, while to-day the channels have been deepened and they have been locked and dammed and the great seaport harbors deepened and obstructions removed, particularly illustrated by Hellgate of New York.

If interstate commerce and foreign commerce and the use of order bills of lading were not sufficiently developed in 1885 to warrant the application of the ordinary commercial doctrine of agency to common carriers, conditions have entirely changed in 1912 to protect \$25,000,000,000 of bills of lading and this great modern instrument of interstate and foreign commerce, this instrument of credit, which plays such an important part in our national and international trade.

There has been some discussion indulged in by previous speakers as to the significance of section 23 in the Pomerene bill and section 4 in the Clapp-Stevens bills. It is possible that some light may be thrown on the question by resolving this section into three parts. The first part imposes a liability upon a carrier for the act of an agent within the scope of his authority, in broad language, as follows:

If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to the consignee named in a nonnegotiable bill or the holder of a negotiable bill who has given value in good faith relying upon the description therein of the goods for damages caused by the nonreceipt by the carrier or the connecting carrier of all or part of the goods or their failure to correspond with the description thereon in the bill at the time of its issue.

This section then contains a provision under the terms of which, under the collocation of facts enumerated, the carrier is exempted from the liability imposed in the paragraph quoted as follows:

If, however, the goods are described in a bill merely by a statement of marks or labels upon them or upon packages containing them or by a statement that the goods are said to be goods of a certain kind or quality, or in a certain condition, or it is stated in the bill that packages are said to contain goods of a certain kind or quality or in a certain condition, or that the contents or condition of the contents of package are unknown, or words of like purport are contained in the bill, * * * shall not make liable the carrier issuing the bill, although the goods are not of the kind or quality or in the conditions which the marks or labels upon them indicate, or of the kind or quality or in the condition they were said to be by the consignor. The carrier may also, by inserting in the bill the words "shipper's load and count," or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; * * * the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt of by the misdescription of the goods described in the bill.

This second paragraph thus exempting the carrier from the liability imposed in the first paragraph is again abrogated by language in the second paragraph, which reimposes the liability imposed by the first paragraph if the statements contained in the second paragraph are untrue in a bill of lading.

This is analogous to the ordinary law of carriers, which in the first place makes the common carrier liable as an insurer for the loss of goods and then exempts the carrier if the loss happens through the act of God, the public enemy, the inherent nature of the goods or the act of the shipper. It then reimposes a liability of insurer if the act of man contributes with the act of God or the act of the public enemy.

The statement referred to in this section is not the statement of the shipper to the carrier, but the statement made by the carrier in the written or printed part of the bill of landing, or stamped thereon by rubber stamp or otherwise.

As to who loads a shipment depends upon the tariff filed by the railroad. In less than carloads lots the carrier almost universally

loads; in carload lots the shipper almost universally loads. Where the shipper loads the railroads have an opportunity to make the count. In many cases a car is loaded on a far distant side track, such as a lumber camp, and the shipper loads and the railroad does not count because to count would be an increased cost of carriage which the shipper would ultimately bear.

The most glaring specific evil to be rectified in the use of bills of lading is covered by section 23 of the Pomerene bill, but there are many other evils to be corrected of great if not equally great importance, and they have already been briefly referred to.

The question has been asked as to the circumstances under which the Pomerene bill was framed. The Commissioners on Uniform State Laws committed the preparation of a bill on this subject to the committee on commercial law of that body and authorized it to employ Prof. Samuel Williston, of the Harvard Law School as its draftsman.

This committee had this bill under consideration for four years and held public meetings at which representatives of the bankers, the carriers and shippers and receivers of freight appeared—the four classes of persons vitally and directly affected. The trunk-line association, which represents all railroads in official classification territory, were represented by able counsel. In all legislation there must be compromises, and compromises are proper when they rest on sound ethics. This act in that respect does not differ from any other well considered piece of legislation. The American Bankers Association was represented by Mr. Thos. B. Paton, their general counsel. The National Industrial Traffic League spoke through its president, Mr. J. C. Lincoln. The committee on commercial law and Prof. Samuel Williston, its draftsman, sought to stand impartially as between the four interests and to reconcile the same. It is not a measure of expediency, but an impartial set of rules as between four conflicting interests. These seemingly four hopelessly conflicting interests reconciled all differences, the last and final hitch being on the word "herein" in the draft of the first section which was changed to "in this section," and the measure then received the unanimous approval of the representatives of these four interests. The measure was debated, not only in committee but many times debated by the whole Commission on Uniform State Laws and finally approved at Detroit, Mich., August 23, 1909.

On September 13, 1909, a conference on the whole subject of bills of lading was held at the Auditorium Hotel, Chicago, Ill., under the auspices of the American Bankers Association at which all the commercial interests of the United States were represented, and the measure approved without a dissenting vote. In the pamphlet I have here, entitled "American Uniform Commercial Acts" will be found a list taking some five pages on which are enumerated those in attendance.

Senator POMERENE. I wish you would leave that list here so we may incorporate it in your remarks.

Mr. JAMES. I will.

The list referred to is as follows:

Charles W. Baker, secretary the Chicago Live Stock Exchange, Union Stock Yards, Chicago, Ill.

F. L. Bateman, secretary and treasurer Trans-Continental Freight Co., 215 Dearborn Street, Chicago.

- Charles J. Bell, commissioner Sioux City Commercial Club, Sioux City, Iowa.
 O. F. Bell, National Industrial Traffic League, Chicago; traffic manager Crane Co.
 Frank W. Blair, bills of lading committee, Michigan Bankers' Association, Detroit.
 Charles P. Blinn, jr., vice president National Union Bank, Boston, Mass.
 G. W. Bolton, president Rapides Bank, Alexandria, La.; chairman bills of lading committee, Louisiana Bankers' Association.
 Theodore Brent, Chicago, Rock Island & Pacific Railway, Chicago, Ill.
 John F. Bruton, president First National Bank, Wilson, N. C.; chairman bills of lading committee, North Carolina Bankers' Association.
 A. P. Burguin, assistant counsel Pennsylvania lines.
 Leslie Butler, president Butler Banking Co., Hood River, Oreg.
 Edwin Chamberlain, second vice president San Antonio Loan & Trust Co., San Antonio, Tex.
 G. A. Charters, general eastern manager California Fruit Growers' Exchange of Los Angeles, Chicago, Ill.
 E. L. Copeland, secretary and treasurer the Atchison, Topeka & Santa Fe Railway Co., Topeka, Kans.; Association American Railway Accounting Officers.
 George H. Crosby, secretary and treasurer Chicago, Rock Island & Pacific Railway, Chicago; Society of Railway Financial Officers.
 Chas. F. Droste, of Droste & Snyder, New York; chairman traffic committee, New York Mercantile Exchange.
 W. F. Dudley, assistant general auditor Chicago, Milwaukee & St. Paul Railway, Chicago; member standing treasury committee, the Association of American Railway Accounting Officers.
 Henry Dunkak, president New York Mercantile Exchange; of Zimmer & Dunkak.
 Phil. R. Easterday, assistant cashier First National Bank, Lincoln, Nebr.
 J. M. Elliott, Los Angeles Chamber of Commerce, Los Angeles, Cal.
 Joseph S. Ford, chairman treasury committee, Association of American Railway Accounting Officers, Chicago.
 Thomas F. Gallagher, Chicago Butter & Egg Board, Chicago.
 Albert D. Graham, vice president-cashier Citizens' National Bank, Baltimore, Md.
 Cliff W. Gress, cashier Citizens' State Bank, Cannon Falls, Minn.; member bills of lading committee, Minnesota Bankers' Association.
 Edward Pierce Higgins, auditor disbursements "Big 4," Cincinnati; representing treasury committee, Association American Railway Accounting Officers.
 W. L. Hinds, president Merchants' Transfer & Storage Co., Des Moines, Iowa; representing the American Warehousemen's Association.
 W. M. Hopkins, manager transportation department, Board of Trade, Chicago.
 T. S. Howland, Chicago, Burlington & Quincy Railroad Co., Chicago; Society of Railway Financial Officers.
 C. G. Hutcheson, chairman bills of lading committee, Missouri Bankers' Association; cashier First National Bank, Kansas City.
 George W. Hyde, chairman bills of lading committee, Massachusetts Bankers' Association; assistant cashier First National Bank, Boston.
 William Ingle, vice president and cashier Merchants' National Bank, Baltimore, Md.; member bills of lading committee, American Bankers' Association.
 Francis B. James, president Ohio State Board of Uniform State Laws; chairman committee on commercial law of the Commissioners on Uniform State Laws, and chairman of the committee on commercial law of the American Bar Association, Cincinnati, Ohio.
 J. Lloyd Jones, president United States Canning Co., Fredonia, N. Y.
 P. C. Kauffman, chairman bills of lading committee, Washington Bankers' Association; second vice president Fidelity Trust Co., Tacoma, Wash.
 N. B. Kelly, commissioner of transportation, Chamber of Commerce, Philadelphia, Pa.
 J. B. Korndorfer, cashier Peoples National Bank, Brooklyn, N. Y.; member bills of lading committee, New York State Bankers' Association.
 William A. Law, vice president Merchants National Bank, Philadelphia, Pa.; member bills of lading committee, Pennsylvania Bankers' Association.
 J. A. Lewis, cashier National Bank of Commerce, St. Louis, Mo.; member bills of lading committee, American Bankers' Association; member bills of lading committee, Missouri Bankers' Association.
 J. C. Lincoln, president National Industrial Traffic League; commissioner of Merchants' Exchange Traffic Bureau, St. Louis, Mo.
 William Livingstone, president Dime Savings Bank, Detroit, Mich.; member bills of lading committee, American Bankers' Association.
 Elliott C. McDougal, president Chamber of Commerce, Buffalo, N. Y.; member bills of lading committee, New York State Bankers' Association.

E. J. McVann, manager traffic bureau, Commercial Club of Omaha, Nebr.; member uniform bills of lading committee, National Industrial Traffic League.

E. F. Madden, president First National Bank, Hays City, Kans.

Frank E. Marshall, secretary the Commercial Exchange, Philadelphia, Pa.

George F. Mead, Boston Fruit and Produce Exchange, Boston, Mass.

George W. Neville, chairman bills of lading committee, New York Cotton Exchange.

A. W. Newell, president Fourth National Bank, Boston, Mass.

A. R. Paton, Baker-Vawter Co., Chicago, Ill.

Thomas B. Paton, general counsel American Bankers' Association, New York.

Carroll Pierce, vice president Citizens National Bank, Alexandria, Va.; chairman bills of lading committee, Virginia Bankers' Association.

Lewis E. Pierson, president Irving National Exchange Bank, New York; president American Bankers' Association; chairman bills of lading committee, American Bankers' Association.

Julius S. Pomeroy, cashier Security National Bank, Minneapolis, Minn.

F. H. Price, president Herbert Bradley Co., New York; member committee Uniform Ocean Bills of Lading Association.

W. F. Priebe, Chicago, National Poultry, Butter and Egg Association.

Mr. Prince, Rock Island Railroad, Chicago.

Jonathan P. Reeves, treasurer Chicago & Eastern Illinois Railroad Co.; representing Society of Railway Financial Officers, bills of lading committee, Chicago.

C. L. Robey, cashier Purcellville National Bank, Purcellville, Va.

Henry Russel, Detroit, Mich.; general counsel Michigan Central Railroad and counsel to Carriers' Bills of Lading Committee.

F. W. Sawyer, cashier Souhegan National Bank, Milford, N. H.; chairman bills of lading committee, Northern Bankers' Association.

John C. Scales, chairman refrigerator car lines committee, National League of Commission Merchants, Chicago.

Francis B. Sears, vice president National Shawmut Bank, Boston, Mass.

E. K. Smith, chairman bills of lading committee, Arkansas Bankers' Association, Texarkana, Ark.

Hal. H. Smith, attorney Michigan Bankers' Association; member legislative committee, National Industrial Traffic League.

C. B. Stafford, commissioner Memphis Grain and Hay Association, Memphis, Tenn.

Irvine B. Unger, Old Detroit National Bank, Detroit, Mich; member bills of lading committee, Michigan Bankers' Association.

J. D. Whisenand, vice president Central State Bank, Des Moines, Iowa; chairman bills of lading committee, Iowa Bankers' Association.

W. T. S. White, member National Association Poultry, Butter, and Eggs, Chicago.

E. E. Williamson, Receivers and Shippers' Association, Cincinnati, Ohio.

Samuel Williston, Harvard Law School, Cambridge, Mass.

This measure, therefore, can not be said to be an experiment; can not be said to be a measure that has not been submitted to all conflicting interests.

Senator CUMMINS. How do you account for the fact that the railroads are opposing it here?

Mr. JAMES. I do not find a representative of a northern railroad here. I want to say that we never did have the cooperation of the southern railroads.

Senator CUMMINS. I did not understand the distinction.

Mr. FAULKNER. So that there may be no doubt about the proposition, I want to say that I stand here representing a number of the northern railroads, as well as the western and southern roads to a large extent; most of the large roads.

Senator CUMMINS (addressing Mr. Faulkner). Do you agree that all your railroads met together in Chicago and consented to this bill?

Mr. FAULKNER. No; I shall answer that when we come to present our side. I will admit that the representatives of some of the roads did meet in Chicago, but I do not admit that we agreed that we were in favor of that bill.

Mr. JAMES. I can possibly produce the correspondence and telegrams to show that the railroads represented in the trunk-line associa-

tion did agree; that in Detroit, when this measure was adopted, representatives of the trunk-line association appeared and gave their consent. It is possible that the stenographic notes of that meeting can be found.

At these various committee meetings and conferences, every interest was given as much time as it wanted, and the trunk-line association was represented by F. A. Farnum, of the New York, New Haven & Hartford Railroad; Mr. A. P. Burguin, of the Pennsylvania system, and Mr. Henry Russell, of the New York Central system. At one of the early meetings of the committee on commercial law, Mr. Warfield appeared for the Louisville & Nashville system, but not at the subsequent meetings. Prof. Samuel Williston, on behalf of the committee of commercial law, had frequent meetings with counsel for railroads in official classification territory, speaking through the trunk-line association. The southern railways have never cooperated as have the northern railroads in the many needed reforms, which can also be illustrated at the time the Interstate Commerce Commission recommended a uniform list of conditions limiting carriers' liability to be indorsed on the back of a uniform bill of lading.

My friend, Senator Faulkner, says he does not speak merely for the southern roads.

MR. FAULKNER. I have said that I represent northern, western, and southern roads.

MR. JAMES. Let me tell an incident along the lines of the attitude of the northern roads—that is to say, the railroads in official-classification territory wherein moves 65 per cent of the entire American tonnage, and wherein the railroads collect as large a per cent of the entire railroad revenue. Senator Pomerene can probably corroborate me in part. The Legislature of Ohio, over the senate of which Senator Pomerene presided with his usual grace, had before it this same bill applicable to intrastate commerce, and, of course, in the absence of congressional legislation, to other commerce. The measure was before the judiciary committee of the house, of which Mr. Gebhardt, an able lawyer from Dayton, Ohio, was chairman. Ex-Senator West, counsel for the New York Central system at Cleveland, appeared with me before this committee; he on behalf of the railroads and I in support of the bill. After the measure was thoroughly debated for several hours before the committee; ex-Senator West, one of the ablest lawyers who ever sat in the Senate of Ohio, asked the committee to postpone action until he could consult with the general counsel of the New York Central system, of New York. After a consultation ex-Senator West withdrew all opposition to the bill. The next opposition that turned up came from Mr. Hopkins, of Cleveland, as representing the express companies. I met him in Columbus on several occasions and fully discussed the measure with him, and satisfied him of its fairness. After he had discussed the matter with the express company he withdrew all objections and the measure was unanimously reported out of the house committee on the judiciary and unanimously passed the house of representatives. It was then unanimously reported out of the judiciary committee of the senate and unanimously passed by the senate and signed by Gov. Harmon. This measure, therefore, had the unanimous indorsement of the legislative and executive branches of the Ohio government, and from conversations with members of the supreme court of Ohio was quite pleasing to the judicial body. Ohio has now adopted each

and every uniform commercial act recommended by the Commissioners on Uniform State Laws.

Is the measure constitutional? It has been suggested that possibly some of the sections of the Pomerene bill are unconstitutional. The same line of reasoning would make the Clapp-Stevens bills unconstitutional.

An order bill of lading is not merely a muniment of title; not merely a symbolical representative of the goods described therein, but is of itself separate and apart and above these things—instrument of interstate and foreign commerce. Congress has legislated on bills of lading as instruments of interstate and foreign commerce as illustrated by the Harter Act, the Carmack amendment to the Hepburn Act of 1906, and the act of June 18, 1910. Highways are brought into existence by the act of man; they exist *de facto*; railway trains are brought into existence by the act of man; they exist *de facto*; bills of lading were brought into existence by the usage and custom of merchants; they exist *de facto*; none of them are commerce, but each and all of them are instruments of commerce; when they touch commerce that crosses State lines they are instruments of interstate or foreign commerce; such instruments are subject to the sole and exclusive jurisdiction of the United States in Congress assembled. If the Pomerene bill be enacted into law, it seizes this instrument of interstate and foreign commerce, protects it, fosters it, defines its functions, specifies rights, duties, powers, and obligations of all who deal with it; adds legal sanctions, civil and criminal, so that it may preserve and legally enforce the customs and usages of merchants and make it effective as an instrument of national and international trade and commerce freed from diversified and conflicting State regulations.

Let us for a moment examine the language of the Constitution. It says, "Congress shall have power to regulate commerce among the States and with foreign nations." None of the following items are commerce: Highways, railroad trains, railroad cars, railroad tracks, sidetracks, locomotives, brakemen, signal lights, automatic couplers, hours of labor, employers' liability, shipping documents. It is true that at one time it was urged in the Supreme Court of the United States that under the power to regulate commerce that Congress had no power to control the instruments of interstate commerce. But in the great case of *Gibbons v. Odgen*, Mr. Chief Justice Marshall held that as Congress was given power to regulate commerce and to pass all laws necessary to carry that power into effect, that Congress had power to regulate all instruments of commerce. Once Congress takes jurisdiction of an instrument of interstate commerce it has full power to fully protect that instrument and to carry this power to its logical sequence.

The scope of this power has been recently illustrated, October 30, 1911, in *Southern Railway Co. v. United States* (222 U. S., 20), the syllabus of which is as follows:

The safety-appliance act of March 2, 1893 (27 Stat., 571, ch. 196), as amended March 2, 1903 (32 Stat., 943, ch. 976), embraces all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce and is not confined exclusively to vehicles engaged in such commerce.

The power of Congress under the commerce clause of the Constitution is plenary and competent to protect persons and property moving in interstate commerce from all danger, no matter what the source may be; to that end Congress may require all vehicles moving on highways of interstate commerce to be so equipped as to avoid danger to persons and property moving in interstate commerce.

Mr. Justice Van Devanter, who delivered the opinion of the court, said, at page 26:

We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving intrastate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection between what is required by these acts in respect to vehicles used in moving intrastate traffic and the object which the acts obviously are designed to attain, namely, the safety of interstate commerce and of those who are employed in its movement; or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate? If the answer to this question, as doubly stated, be in the affirmative, then the principal question must be answered in the same way. And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise in whole or in part out of matters connected with intrastate commerce.

It is submitted that following a bill of lading through all of its ramifications, the Pomerene bill is a measure to insure the safety of those who deal with this instrument of national and international commerce by clearly and explicitly defining it and the rights, duties, and obligations of each person brought in privity therewith. In the case just cited the Supreme Court sustained the constitutionality of a statute protecting one instrument of interstate commerce, to wit, a highway, by safeguarding the safety of persons and property using the same; the Pomerene bill seeks likewise to safeguard and protect the safety of those using another instrument of interstate commerce, to wit, a bill of lading. The Clapp-Stevens bills seek to protect one who "acquires" an order bill of lading for value and in good faith. How it shall be thus "acquired," whether with or without indorsement, or what shall constitute value, or what shall be good faith, are left indefinite and uncertain and might be given as many meanings as there are courts before whom such questions might come. Legislation at this stage of the measure is cheaper than litigation. What the American business man wants is certainty in advance and not post mortem justice, after the end of years of litigation and heavy court costs and expenses. The Clapp-Stevens bills leave these matters open and the Pomerene bill fixes them with that certainty of language of trade and commerce which has already acquired a definite legal meaning. If Congress had power to regulate an instrument of national and international commerce, it has power to safeguard the rights of each and every person brought into privity with it. If we are to have a national act, dealing with a national instrument of interstate commerce, it should deal with it fully and not merely in part by national law and in part by a diversity of conflicting State laws.

Senator CUMMINS. Will a question interrupt you?

Mr. JAMES. Not at all.

Senator CUMMINS. I ask it purely to get your view. You say, very truly, that the bill of lading represents really, or is the evidence

of title to cotton, or to any other commodity that may be in the course of shipment?

Mr. JAMES. I will say this—

Senator CUMMINS. Does it make any difference under your view when the transfer takes place?

Mr. JAMES. I do not see how it could.

Senator CUMMINS. Suppose a shipment of cotton was made from the South to Boston. Of course, the shipment itself is commerce; it is a part of commerce. Suppose it is delivered to the person to whom it has been consigned in Boston. I take it that it then ceases to be the subject of interstate commerce?

Mr. JAMES. You mean the goods have been actually delivered—yes.

Senator CUMMINS. Suppose after the shipment had reached its destination that the citizen of Massachusetts should assign his bill of lading to another citizen of Massachusetts, would it still be a matter of interstate commerce?

Mr. JAMES. It—an order bill of lading—was an instrument of interstate commerce, and the Pomerene bill provides that the carrier shall not deliver up the goods without the surrender of the bill.

Mr. FAULKNER. An order bill.

Senator CUMMINS. I am speaking of a straight bill of lading, because the same thing applies to both.

Mr. JAMES. It applies in a different degree, of course.

Senator CUMMINS. The goods are consigned to John Jones, or the shipment is, and the bill of lading is so issued. Now, could that bill of lading be transferred, after the shipment had come into the possession of John Jones, and still be controlled or regulated by Congress?

Mr. JAMES. I think it could, for this reason: It having become an instrument of interstate commerce, it should be followed to its logical consequence or conclusion—in other words, until it comes to an end. The bill having been an instrument of commerce, the rights of the parties privy thereto can be safeguarded through all the ramifications.

Senator CUMMINS. You think there is a distinction in such a case between the delivery of the goods and the subsequent transfer of the bill?

Mr. JAMES. That is right. Take this case: A carrier of an interstate shipment parts with possession of the goods. Say a carrier has a box of books and he wrongfully delivers those books to the wrong person. Why can he not be made liable under an act pertaining to interstate commerce? The law now provides in the case of lost or damaged goods in an interstate shipment, under the Carmack amendment, by a connecting carrier, the initial carrier shall be liable. Now he is liable in case the loss or damage occurred within the State or beyond the State.

Senator CUMMINS. Does the liability of the road follow during course of shipment?

Mr. JAMES. Yes.

You can provide for the transfer of that Federal right. We will say that a straight bill of lading for an interstate shipment is issued to me. That is an instrument of interstate commerce. My rights with reference to that railroad company will be defined by the Pomerene bill. Congress having regulated that an instrument of interstate commerce, may define my right to part with that instrument.

It can make it, for example, like it is at common law, nonassignable, or may prescribe the manner of transferring it.

Senator CUMMINS. Your idea is that the consignee then could not transfer it in any other way except by indorsement of the bill of lading?

Mr. JAMES. If an order bill of lading, indorsement of the bill of lading if the Pomerene bill becomes a law.

Senator CUMMINS. He could make a bill of sale of it and simply surrender his bill of lading to the railroad company, and that would be an entirely legal transaction?

Mr. JAMES. Yes, sir; entirely.

Senator CUMMINS. But his bill of sale would not be a part of interstate commerce?

Mr. JAMES. No; because in that case he has not pursued the methods of transfer pointed out by the law. What I contend for is this: Once you get the spirit of the national throb—as I believe our ancestors saw it in founding the Constitution—it is as plain as the sun that under the power to regulate interstate and foreign commerce and the power to pass all laws to carry that power into effect those incidental powers follow right down to the most minute detail.

The CHAIRMAN. Mr. James, it is evident that you can not get through with your argument this afternoon, and the committee will now take a recess until to-morrow morning.

Thereupon, at 5 o'clock and 10 minutes p. m., the committee took a recess until 10 o'clock to-morrow (Saturday) morning, February 17, 1912.

FEBRUARY 17, 1912.

COMMITTEE ON INTERSTATE COMMERCE,
UNITED STATES SENATE,
Washington, D. C.

The committee met at 10 o'clock a. m.

Present: Senators Clapp (chairman), Crane, Cummins, Brandegee, Townsend, Foster, and Pomerene.

STATEMENT OF FRANCIS B. JAMES—Resumed.

The CHAIRMAN. Mr. James, you may continue your statement.

Mr. JAMES. Mr. Chairman and gentlemen, the most recent utterance upon the breadth of the power of Congress to deal with every instrument and every instrumentality of interstate and foreign commerce to its full logical extent was decided on January 9, 1912, in the case of Northern Pacific Railway Co. v. The State of Washington (222 U. S., 370). It appears that the State of Washington had an hours-of-service law. Congress also passed an hours-of-service law to become effective at a future date. The prosecution by the State of Washington against the Northern Pacific Railway Co. proceeded for acts done during the interim between the passage of the Federal act and the date of its taking effect. The question presented was whether the Federal act covering the same subject matter as the State act had superseded the State act during the interim. Mr. Chief Justice White held that the Federal act, taking effect in the future, did of itself suspend the State act. The syllabus states:

A train moving and carrying freight between two points in the same State but which is hauling freight between points one of which is within and the other without the State, or hauling it through the State between points both without the State, is engaged in interstate commerce and subject to the laws of Congress enacted in regard thereto.

Mr. Chief Justice White said:

This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling.

This national and international instrument of credit; this national instrument of national and international trade and commerce, arising out of the power to regulate commerce. It is more than a mere document of title. It is more than a mere symbolical representative of the goods. It is itself an instrument, with rights attaching to the instrument itself and embodied in its terms. Once Congress assumes to regulate that instrument of commerce, to fully protect it and the rights of persons dealing with such Federal instrument of interstate commerce, it would have a right to carry such regulation to its logical conclusion. Congress could say whether it should be negotiable or not negotiable; determine the legal effect of the words "to order." This bill of Senator Pomerene goes directly to the meat of the subject; not by indirect language, but by expressly declaring that an instrument "to order" is a negotiable instrument; an instrument not to order is a straight bill of lading and nonnegotiable. The Stevens-Clapp bill, instead of going directly to the point simply states that the carrier shall be estopped, which amounts to the same thing as declaring it negotiable.

It has often been in the development of the law the courts pretend to follow the common law rule to reach a subject change it through the form of a fiction and through the form of estoppel. There is no difference in substance if you say the carrier is estopped to deny receipt of goods, or state in direct language that the carrier is responsible for the act of its agent.

That powers vested in Congress may be carried to their logical conclusion is found in other fields of jurisprudence covered by Federal legislation. For example, the Sherman antitrust law. For instance, A and B in a State enter into an agreement with reference to an article of interstate commerce. The mere making of that agreement, although no commerce ever moves or was restrained, constitutes the offense.

That mere agreement would precede commerce, precede transportation, and precede intercourse. To use the language of Mr. Justice Marshall, commerce did not mean mere transportation; it meant commercial intercourse and all its instrumentalities. Under the power to coin money Congress has assumed ample power to deal with the creation of paper currency; to make that currency legal tender in the payment of debts between citizens of a State. In the Post Office Department, under the power to establish post offices and post roads, Congress has power to make all laws to make that power effective. The Government could even trace a letter after it was delivered and safeguard that letter as against a person who had no authority to open it, although there was no power enumerated in the Constitution

so to do, but only the general power to establish post offices and post roads.

So with respect to the matter of the white-slave traffic—not pertaining to immoral relationship during the transit—but the intent preceding the transit to be accomplished after the transit was ended.

So with the revenue—the power to collect internal revenues and customs duties.

What is the remedy? It is earnestly urged that the remedy is through a comprehensive measure like the Pomerene bill. With all due deference and with the greatest respect and admiration for the American Bankers' Association, it is respectfully submitted that the Clapp-Stevens bills are rather expedients than comprehensive remedies. It is suggested that when Congress does take jurisdiction over bills of lading as instruments of interstate and foreign commerce that it should do so in a comprehensive measure which has been demonstrated to thoroughly and impartially settle the rights as between four seemingly hopelessly conflicting interests and not by a measure of expediency which reaches merely the evils from which the bankers may suffer or the evils from which a particular class of shippers may suffer. The suggestion has been made that the railroad companies and the bankers be allowed to get together and submit an agreement which shall be taken as settling the terms of the law. While I know from my personal knowledge that the American Bankers' Association has been one of the usual organizations in this country in supporting the advance movement for uniform commercial legislation, yet I submit that there are four interests which should be consulted. Two of these interests, namely, the shippers and receivers of freight, are divided into many well-defined groups, and no one group should be consulted to the exclusion of numerous groups included within the classes of shippers and receivers of freight. I am quite sure it is the desire of this committee that not merely the interests of the bankers and some shippers should be considered, but all the interests of consignors and consignees of all classes of merchandise, and that an agreement, if any, should be the result of the conference of bankers, railroads, and each and all of the other groups of shippers and receivers of freight.

In concluding I wish to ask permission to attach, as an appendix to what I have said, a review of the Pomerene bill as contained in the *Traffic World and Traffic Bulletin*, volume 9, No. 6, for February 7, 1912, pages 253 and 254, without stopping to read it. It is a brief summary of the Pomerene bill.

Senator CUMMINS. The bill which you have presented specifically provides that a bill of lading issued to the order of any person is a negotiable bill or instrument. What do you understand to be the qualities which that designation gives to such an instrument other than the specific provisions, or specific guarantees, that are otherwise provided in your bill?

Mr. JAMES. Section 31 specifically defines the qualities of a negotiable bill. Section 5 provides—

That a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is a negotiable or order bill.

Section 31 then goes on to define the quality of negotiability; that the negotiable bill may be negotiated. You will find that the dis-

inction is made between the negotiation of a negotiable bill and the transfer of a nonnegotiable bill.

Senator CUMMINS. I am trying to find out what the additional qualities are that you give to order bills when you describe them as negotiable. You, of course, have something in your mind other than mere assignability?

Mr. JAMES. Yes; upon being indorsed, the act provides how it shall be negotiated. First of all it provides it shall have indorsement. Having been indorsed, and being in the possession of an innocent purchaser for value, the carrier then has no right to dispute, for example, the agency of the agent within the scope of which apparent authority the bill was signed. It would be absolutely binding against the carrier. It would protect the holder for value in good faith against a person who had lost the bill, giving him a right as against the goods, the same as a bill of exchange or a draft or a promissory note.

Senator CUMMINS. The thing that you first mentioned is specifically provided for, namely, that the railroad company is not permitted to deny that it was in possession of the goods described in the bill when the bill was issued. Now, that is one of the things you desire to accomplish, I take it, by this proposed legislation; but I want to know what other qualities of negotiability—as it is generally understood in the law of merchants—you intend to confer upon bills of lading?

Mr. JAMES. No greater than the rights would be under a draft or a promissory note or a bill of exchange.

Senator CUMMINS. Then you do intend, by the use of the word "negotiable," to give to such a system all the characteristics according to the law of merchants which is given to negotiable bills and notes and acceptances and the like?

Mr. JAMES. That is right. I might state that a great deal of American legislation has been passed in which an attempt to reach this result was made but frustrated by a very narrow construction by the Supreme Court of the United States. The Supreme Court of the United States reached what is now generally conceded to be an erroneous decision. It arose in this way: Legislation was passed in a number of States saying that bills of lading should be negotiated in the same manner as promissory notes. In the Shaw case the question came up in 1901 in the Supreme Court (*Shaw v. Railroad Co.*, 101 U.S., 557). The State of Missouri passed a law saying a bill of lading shall be negotiable in the same manner as promissory notes. The State of Pennsylvania passed a law in identically the same terms. A draft was drawn by a merchant in St. Louis against a merchant in Philadelphia with an order bill of lading duly attached. The drawee had a copy of the bill. The bank messenger took the draft over to the office of the drawee and it was handed through the window of the cashier. The clerk took it into the back room and the drawee wrote his acceptance upon the draft, detached the original bill, and reattached the copy. Neither the messenger nor the bank noticed the substitution. The question arose whether the holder for value would be protected. The Supreme Court of the United States held that as the statute of Missouri and the statute of Pennsylvania said a bill of lading should be negotiable in the same manner that that meant only the manner of indorsement and not the effect of the

indorsement, forgetting and not alluding to the statute of Anne of 1704. You will remember, in 1702, in *Clerk v. Martin*, when an attempt to sue was made by a bona fide purchaser of a note for value, Lord Chief Justice Holt held that the merchants of Lombard Street were trying to set the law of Lombard Street over the law of Westminster Hall, and declared a promissory note was not negotiable. The merchant went to Parliament in 1704 and had a law passed upon the subject. That statute provided that promissory notes should be negotiated in the same manner as bills of exchange.

The courts have for all time since held that this made a promissory note negotiable. Whoever drew the statute on bills of lading in Pennsylvania and Missouri drew it distinctly from the statute of Anne, expecting that the statutes of Missouri and Pennsylvania would be given the same construction that had been given to the statute of Anne. But the Supreme Court evidently did not have its attention called to the language of the statute of Anne from which the Pennsylvania and Missouri statutes had evidently been drawn, and gave them a very narrow construction and defeated the purposes of the legislation.

That was one reason why there has been such particularity of language used in the Pomerene bill, instead of using the phraseology of some of the earlier State statutes.

Senator CUMMINS. That is the very thing I have been trying to bring out. You have prescribed in this bill certain consequences that follow the issuance of a bill of lading to the order of any person?

Mr. JAMES. Yes, sir.

Senator CUMMINS. And prescribe the rights of certain persons under or through those bills of lading?

Mr. JAMES. Yes.

Senator CUMMINS. Now, what I want to know is, do you think the use of the word "negotiable," or the attempt to characterize them as negotiable, gives to those instruments any other privileges, if you please, than those which you specifically describe in the bill?

Mr. JAMES. No, sir; I do not.

Senator CUMMINS. Then why do you use the word "negotiable" at all?

Mr. JAMES. Because there is that commercial distinction. It is recognizing commercial usage.

Senator CUMMINS. Put out of your mind entirely a draft that may have been drawn with bill of lading attached. Just let us confine our thoughts to the bill of lading itself.

Mr. JAMES. That is, the order bill of lading?

Senator CUMMINS. The order bill of lading. It is issued to the order of John Smith, we will say. John Smith indorses it to John Jones. Now, do you intend in this bill, by the use of the word "negotiable," to fix the liability of John Smith?

Mr. JAMES. Yes; but not exactly the same liability as attaches to the indorser of a promissory note. We have an express provision—

Senator CUMMINS. I know; but do you intend by characterizing the bill of lading as negotiable to give to the indorsement of the person to whom it was originally issued, or to whose order it was issued, any effect that is not specifically described in the bill?

Mr. JAMES. I do not.

Senator CUMMINS. Then there would be a part of the law relating to negotiable paper that would not apply to the bill of lading, although it is here characterized as negotiable.

Mr. JAMES. Yes; and for this reason: That there are certain attributes, natural attributes, of a bill of lading representing goods which would not be the attributes of a promissory note. Therefore the distinction is made. Section 32 defines the rights of a holder of a duly indorsed negotiable instrument. Section 35 enumerates the liabilities which are incurred by the indorser. Section 36—

Senator CUMMINS. You need not repeat that, because I have become reasonably familiar with those sections during the night. I simply want to know whether the provision of the bill, which declares in terms that these instruments shall be negotiable instruments, has any effect whatsoever, or do you intend it to have any effect?

Mr. JAMES. It is a proper and appropriate nomenclature to distinguish the two kinds of bills. If you could define the qualities without using the word "negotiable" it would be just as effective legally, but as you are dealing with two kinds of bill of lading it is necessary to adopt some nomenclature. The nomenclature of both trade and the law is adopted by saying a bill to order is an order bill of lading which shall also be known as a negotiable bill. When that kind of a bill of lading is issued it shall also be known as negotiable paper—

Senator CUMMINS. Practically speaking, the proposed legislation would be just as effective for your purposes if that order bill of lading was not described or characterized as a negotiable instrument?

Mr. JAMES. Yes, sir.

Senator CUMMINS. There is no privilege or consequence that you desire, and which you think necessary, that are not provided for in the bill in terms?

Mr. JAMES. That is right; yes, sir. It was intended that it should be—

Senator CUMMINS. Now, what are the, if you please, immunities that are given to the "to order" bill of lading in your bill that are not given to the so-called "straight" bill of lading?

Mr. JAMES. The order bill of lading protects the bona fide purchaser for value. The straight bill of lading does not. One is a negotiable instrument, and the other is a nonnegotiable instrument.

Senator CUMMINS. You mean to say that with the straight bill of lading under this proposed act the railroads would be at liberty to deny the receipt of the goods upon an assignment of the straight bill of lading to a third person without notice for value?

Mr. JAMES. Section 23 covers that case of the straight bill, that the consignee who advances money on the straight bill is protected.

Senator CUMMINS. If that be true, what is the immunity that you give to your negotiable paper that you do not give to your straight bill?

Mr. JAMES. That is the only feature in which there is an analogy.

Senator CUMMINS. That is the very thing you desire, that if a person, either on a straight bill of lading or a "to order" bill of lading, advances money upon the faith of the statement contained in the bill of lading, namely, the receipt of the goods by the railway company, that that person shall, as against the railway company, have a right to recover, or a right to receive those goods, no matter whether the railway company got them or not. That is the general idea, is it?

Mr. JAMES. Yes, sir. This protection as to nonreceipt of goods is specifically the same as a straight order. The other features of the bill, and the other abuses which have arisen out of the bill of lading, have arisen largely in the case of the order bill. For example, in the case of an order bill of lading, mistake is guarded against by requiring the word "order" to be printed. By the old practice bills of lading were in but one form—"received to be delivered to"—and then there was a blank space before the name of the consignee. The practice in making an order bill was to take a pencil and write in the word "order." The railroad company would do that. Cases arose where a railroad company would give a man a straight bill of lading, and the consignee would wrongfully write in the word "order."

The waybills of a railroad would not indicate that an order bill of lading had been issued, and on a straight bill of lading the carrier has the right by usage, and under the Pomerene bill, to deliver the goods without a surrender of a straight bill of lading. This danger is provided against by providing that in the order bill of lading the word "order" shall be printed for the protection of the order bill. That is one of the evils particularly pertaining to the order bill.

The Pomerene bill also places its disapproval upon the issuance of order bills in sets. The practice has almost disappeared in the case of our domestic commerce.

The other evil is as to spent order bills of lading. A spent bill of lading is one on which the goods have been surrendered by the carrier. The common-law rule is that the carrier was not bound to compel the surrender of the bill and could deliver the goods without surrender. If the carrier had delivered goods without the surrender of the bill of lading, the carrier was protected against the innocent carrier. So this law provides, in the case of an order bill of lading, that the bill of lading must be surrendered before the goods are delivered.

The second provision is not only for surrender, but also for cancellation. The bona fide holder at common law would not be protected even though these bills were abstracted fraudulently and negotiated.

There is very little in this bill peculiarly applicable to the straight bill of lading. Another provision is that where there is an order bill of lading the attachment of the goods is forbidden as long as it is outstanding. There is another provision as to stoppage in transit, and various other provisions amplifying the order bill of lading, making it not only legally but commercially negotiable.

Senator CUMMINS. Then it is perfectly obvious that you want to do a good deal more than to correct the mistakes which you think the Supreme Court made in 1855?

Mr. JAMES. Correct other mistakes and cover matters of actual custom and usage of merchants on which the Supreme Court of the United States and other Federal courts have not yet spoken.

Senator CUMMINS. Yes. It is really a new code on bills of lading. It is not confined merely to a change in the law which would hold the railroad companies or transportation companies liable for the act of their agents. You are really laying down a new system for bills of lading?

Mr. JAMES. It is a new code in the sense that it is reducing the custom and usages of merchants to a statute and adding legal sanctions thereto, both civil and criminal, enforceable as one unit of Federal law pertaining to national and international instruments of commerce. It is not a new code in the sense that it was evolved by a process of a priori reasoning. It does, however, systematize the usages and customs of merchants as found in judicial decisions on bills of lading and cognat subjects; statutes passed by various States in furtherance of negotiability and well-considered judicial decisions thereon and actual usages and customs of merchants where such customs and usages were in harmony with sound economics and rested on ethical principles at the foundation of all jurisprudence. By a process of a posteriori reasoning—by a process of rational induction—these rules were systematized. The Pomerene Act therefore would not properly be called a new system of bills of lading, but would be more correctly called a systematizing of the old law merchant on bills of lading, correcting obviously obsolete or ill-considered judicial decisions and the addition of Federal legal sanctions. There being no Federal common law, it has always been found necessary when Congress has assumed jurisdiction to exercise a power conferred on it by the Constitution to exercise that power in the form of a statute. In that respect the Pomerene bill is not a departure, but in harmony with universal practice and precedent.

Senator CUMMINS. But, as has been stated here, the abuse that is sought to be corrected grows out of the act of an agent issuing a bill of lading either fraudulently to the shipper, or by way of accommodation to the shipper, so that the bill of lading itself does not bind the railroad company to deliver the goods which are described in the bill of lading.

Mr. JAMES. Yes, sir.

Senator CUMMINS. Now, if we go that far in a change in the law we would meet the abuse which you and others have so graphically described?

Mr. JAMES. Yes. You would meet one of the abuses, but there are other abuses, though of less magnitude, which are sought to be met also by the Stevens bill, which are recognized as gross abuses. For example, the altered bill.

Senator CUMMINS. Let me ask you this: Suppose you have a bill of lading—consider it now apart from your specific provisions here—an order bill of lading issued to John Jones; John Jones indorses it to John Smith; John Smith, however, does not get the goods. Would John Jones be held liable under his indorsement, under the law merchant?

Mr. JAMES. No.

Senator CUMMINS. That is simply because the bill is negotiable?

Mr. JAMES. No; because section 36 expressly exempts him from performing the obligation assumed by the railroad company.

Senator CUMMINS. No; I am speaking now apart from the specific provisions. You say that the bill is negotiable?

Mr. JAMES. Yes.

Senator CUMMINS. You describe it as negotiable, and attempt in that way to engraft upon it all the characteristics and privileges and immunities of negotiable paper. Now if the person to whom the

order which was issued indorses it to another for value, but that other fails to receive the goods——

Mr. JAMES (interrupting). Through the fault of the railroad?

Senator CUMMINS. Would the indorser be liable to the indorsee?

Mr. JAMES. He would not be, because section 36 specifically provides that he shall not. In that case it makes a different rule than in the case of promissory notes.

Senator CUMMINS. I am asking you to put that aside.

Mr. JAMES. Yes; he would not.

Senator CUMMINS. Because there is some question, I understand, about the constitutionality of that provision?

Mr. JAMES. No, sir.

Senator CUMMINS. But if it is simply described as a negotiable instrument here, if you attempt to put it in the class of negotiable paper, would then the indorser under the law merchant alone be liable to the indorsee?

Mr. JAMES. I believe he would, although in the Shaw case there is some discussion upon that point.

Senator CUMMINS. What process would he have to pass through or go through in order to fasten the liability on the indorser. We know what the holder of a negotiable instrument must do in order to fix the liability of the indorser, but what would the indorsee in this instance have to do?

Mr. JAMES. At common law there were five obligations assumed by the indorser. Four of them are preserved here as to bills of lading; the fifth is not. The fifth one at common law, in regard to promissory notes, was merely as to the solvency of the maker. This liability in the case of nonreceipt of the goods does not go to the question of the solvency of the railroad company.

So, therefore, I think in classifying bills of lading, for example, into the straight and order bills, in the first place, by providing that the bona fide purchaser for value shall be protected by estoppel, you are adding a quality of negotiability.

Now then it is necessary, it seems to me, to supplement that by the specific provisions, because there might be the same doubt which arose in the mind of the Supreme Court in the Shaw case.

Senator CUMMINS. Do you not think, therefore, in order to make a law that will be as plain as possible and afford as little variation in its application as possible, instead of calling the bill negotiable and trying by that general term to give it a certain quality, you had better confine yourself to the specific provisions that you have set forth here and which do fix the rights of all the parties to the bill?

Mr. JAMES. I quite agree with you that there should be provision covering that. Of course, the other question as to whether we should go further in defining the other rights is a question as to whether you take the bold stand that they are within the constitutional power.

Senator CUMMINS. However, constitutionally speaking, I take it that it would be just as much beyond our power to confer a right through the general term of negotiability as to confer the right by specific provision.

Mr. JAMES. I think by conferring it by specific provision you would more clearly keep within the Constitution, because you make it absolutely plain what you mean.

Senator CUMMINS. Precisely; and more than that. If the court should hold that that particular section was unconstitutional, it could be eliminated from the law without danger to the remainder of the act.

Mr. JAMES. Yes; I quite agree with you. The subject matters are clearly distinct. I think the court might declare one section unconstitutional without invalidating the balance.

Senator CUMMINS. But if you were to attempt to broaden these specific provisions by general terms of negotiability, you would not be able then, possibly, to eliminate the objectionable features in the same manner or in the same degree?

Mr. JAMES. Yes; I quite agree with you. You will find, therefore, that sections 4 and 5 call one negotiable and the other nonnegotiable; these are only terms of nomenclature; they do not seek to define. The other sections do seek to define and limit the incident of negotiability; the incident obligations of the indorser; the incidents to the transfer of that bill.

Senator CUMMINS. If we describe what the rights of all the parties are to a bill of this sort, so that they will all be sufficiently protected, it seems to me that it would be wise not to attempt to confuse or to enlarge those specific provisions by using the word "negotiable," which has a definite meaning in the law.

Mr. JAMES. That can be done in section 4, without marring the bill in the least. [Reading:]

That a bill in which it is stated that the goods are consigned or destined to a specific person is a nonnegotiable or straight bill.

Leave out the words "is a nonnegotiable," because those terms are synonymous.

Senator CUMMINS. I can see that. The chief difference between the bill that Senator Pomerene has introduced and the bill that Senator Clapp has introduced lies in this, I take it, that the bill of Senator Clapp simply changes the rule of law as announced by the Supreme Court and estops the railroad company from denying the recitations or statements contained in the bill of lading; whereas your bill or Senator Pomerene's bill does establish a code regulating the rights of all of the parties to these bills with a good deal of elaboration, and does a good deal more than to restore the law, which you think was misunderstood by the Supreme Court of the United States.

Senator Pomerene's bill does establish a code regulating the rights of all of the parties to these bills with a good deal of elaboration, and does a good deal more than to restore the law, which you think was misunderstood by the Supreme Court of the United States.

Mr. JAMES. That is the essential difference. But you will notice that the Clapp bill and the Stevens bill still goes further. To prevent mistakes it is provided that the words "order of" shall be printed in the case of an order bill. It goes on and classifies the straight and the order bill. It prescribes that the straight bill shall have the words "not negotiable." It points out the difference so that a person will not be confused in taking an order bill. It contains a provision similar to this bill, after providing what shall go into the bill—"That nothing herein shall be construed to prohibit the insertion"—you will find that in section 2.

Senator CUMMINS. I know. But I consider the first section of the Clapp bill is rather immaterial. I think its real purposes are all found in section 4 and throughout the rest of the bill.

Mr. JAMES. Of course, section 4 is the one that is aimed at the greatest evil that now exists in the handling of order bills of lading. There is no doubt about that. Just as in the Pomerene bill, section 23 is the vital section as bearing upon that subject, defining it with a little more particularity than section 4, although they are substantially the same.

Of course, the merit of the Pomerene bill is that it brings the Federal statutes into harmony with the State statutes.

Senator CUMMINS. I am not passing any opinion upon the merits of the bill. I simply want to get clearly in my mind and in the record the essential difference between the two.

Mr. JAMES. That was simply a suggestion. My query is whether it would be wiser, in view of a broad public policy, once Congress does take up this subject, to pass a bill not only whose thought and purpose were similar, but whose language would be the same, so that there would be probability of a similar construction. Now in Senator Pomerene's bill there is added a provision so as to preserve the harmony of construction—in a sense—a new rule of statutory construction. Section 52:

That this act shall as far as practicable be interpreted and construed in harmony with the law of those States which enact an act of similar import to make uniform the laws of the various States on bills of lading.

In other words, the attempt is made here to harmonize, so that if we can not get rid of this hopeless conflict between judicial decisions and statutes of the various States and the Federal Government, that there may be somewhat of a homogeneous whole worked out. That is the reason why I put the query whether it would not be wise—

Senator CUMMINS. I think you must doubt very much the wisdom of saying to the Supreme Court or to any subordinate court of the United States that it ought to interpret a law in harmony with the decisions of the States which have similar laws. We can not interfere with the judicial branch of the Government in that way.

Mr. JAMES. The act of 1789 had a rule of decision for the Supreme Court in cases arising by providing that they should follow the law of the State.

Senator CUMMINS. That is a law.

Mr. JAMES. The Supreme Court interpreted that—

Senator CUMMINS. That is a law. But the act of 1789 did not say that the courts of the United States should interpret the laws of the United States in harmony with the way in which the State courts interpreted those laws. It simply suggested the law; when the Supreme Court had occasion to enforce the laws of the State, that they should be in harmony with the interpretation—

Mr. JAMES. Of course, the Supreme Court got away from that statute.

Senator CUMMINS. There was no reference whatever to the interpretation of a law of the United States; only a law of the States themselves.

Mr. JAMES. That was first probably illustrated in *Swift v. Tyson*, in 1834.

The old New York case of *Coddington v. Bey* held that a pre-existing debt was not a valuable consideration for the transfer of a negotiable instrument. That was the New York law. A transfer similar to the one there decided came before the Supreme Court in *Swift v. Tyson*, and they refused to follow the law of New York. They held that they would determine for themselves what was the law of New York.

It is the legislative policy of the Government that there should be certain rules of interpretation. There are rules of interpretation laid down in many Federal statutes.

Senator CUMMINS. You must see the very great difference between our saying to our Supreme Court, "When you have to apply the law of the State of New York, you shall adopt, as far as practicable, the interpretations given by the courts of New York to that law," and saying to the Supreme Court of the United States, "When you are interpreting a law of the United States, you shall give effect to the manner in which it has been interpreted in the courts of New York."

Mr. JAMES. I see the very sharp distinction. All I can say is this: That this probably states in statutory form, which is the ordinary rule anyhow. The ordinary rule is that if one Commonwealth adopts a statute and its court gives it a construction before it is adopted by another Commonwealth that construction shall be implied. This section may state that rule a little stronger than that. This is not laid down as an absolute rule. This section says, "That this act shall, as far as practicable, be interpreted and construed in harmony with the law of those States which enact an act of similar import to make uniform the laws of the various States on bills of lading." That is intended to bring harmony.

But leaving section 52 out, the use of the same language would convey the same thought when embodied in a Federal statute, as tending to bring about homogeneity of American jurisprudence upon the same subject.

Senator CUMMINS. Undoubtedly it would be very desirable if there could be harmony. But I doubt the power of the United States in saying to the Supreme Court that in the construction of its statutes it shall interpret them in accordance with the decisions of other courts.

Mr. JAMES. Striking out this section 52, my query is whether it is not desirable in reaching these evils that the language of the Federal statutes shall as far as possible harmonize with the State statutes. We never can absolutely do away with conflicting decisions.

Senator CUMMINS. I think nobody can question the desirability of uniformity in the law.

Mr. JAMES. My query is whether it would not be a wise policy to use the identical language of the uniform state rather than taking new language which might lead the courts to say that a different meaning was intended.

Senator CUMMINS. That is all.

Senator POMERENE. On yesterday you stated that this bill had the approval of the commissioners on uniform legislation?

Mr. JAMES. Yes, sir.

Senator POMERENE. Did they assist in the preparation of the bill?

Mr. JAMES. It was their bill.

Senator POMERENE. Now, will you state who those commissioners were?

Mr. JAMES. In the first place, in 1890, the State of New York passed a statute for the appointment by the governor of commissioners on uniform State laws, asking the governors of the other States to pass similar laws. All the States, I think, with the exception of one, have passed similar laws.

These commissioners meet in national conference and organize with officers and committees. They have a committee on commercial law. I had the pleasure of being a member of that committee for eight years, and served seven years as its chairman.

The first act framed was the act on negotiable instruments. Mr. Crawford, of the New York bar, was employed to draft that act. It was drafted one year and adopted the same year, and not thrown open for full public criticism. The result was that errors crept into that act.

The committee on commercial law then adopted the policy of full publicity. We employed Prof. Williston as our draftsman. He worked with the committee in the preparation of this act. That act was then thrown open for public discussion, and adopted by a vote of the States.

The bill of lading act was before that body directly for four years, and indirectly for many more years, because many of these principles are embodied in the Sales Act, which has a chapter on documents of title.

Senator BRANDEGEE. I notice at the bottom of page 6 of this bill, 4713, in subdivision A of section 13, line 23, that the carrier "shall be liable, if prior to such delivery he (a) had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery." If the carrier delivers the goods to an indorsee of an order bill of lading, how can he determine the rights of somebody who asserts the right?

Mr. JAMES. In that case, if he delivers the goods and makes a mistake in the delivery, if the person who has the order bill of lading is a bona fide purchaser for value, he is liable, but he can protect himself by an interpleader. He can interplead the parties and thereby be protected. He has a reasonable time. Suppose here are goods to be delivered, and somebody comes claiming the right of possession of the goods, and notifies the carrier. He can deliver them at his risk. He has a reasonable time to make inquiry. At the expiration of a reasonable time if he is not satisfied, or the person claiming the rights has not given a bond, he may interplead the parties.

Senator BRANDEGEE. Suppose the goods are perishable?

Mr. JAMES. He will then have power to dispose of them under the bill in the meantime, or the court may dispose of them.

Senator BRANDEGEE. Is not a bill of lading supposed to be an absolute title, or evidence of title of the goods, which would entitle the person holding it to the possession of the goods?

Mr. JAMES. As far as it is possible to make it. There are, of course, exceptions. And this one recognizes exceptions.

Senator BRANDEGEE. How does the exception come about? How can the title pass, where the bill of lading has been in good faith indorsed, and not forged—how other can the title to those goods pass than by the bill of lading, after the bill of lading has been indorsed?

Mr. JAMES. There might be cases where the bill of lading was good, but there would be no goods back of it.

Senator BRANDEGEE. I am assuming that there are goods back of it.

Mr. JAMES. I mean no title to the goods back of it. For example, I may walk into Woodward & Lothrop's store and steal a box of dry goods and go down to the railroad company and get an order bill of lading, which I indorse over to you. Woodward & Lothrop make discovery before these goods are delivered. They go down and tell the railroad company that that box of dry goods was stolen by James and belongs to them, and they claim it. You come along with your bill of lading, duly indorsed, and they refuse to give them to you unless you give a bond. They say: "We do not want to decide this question." A suit will be entered and each of the parties would set up their respective claims, and the court would decide to whom the railroad company should deliver the goods. The railroad company would interplead Woodward & Lothrop and you, Senator Brandegee.

Senator BRANDEGEE. I do not understand which of those two bills you prefer.

Mr. JAMES. The Pomerene bill.

Senator POMERENE. I should like to ask Prof. Williston a question or two, if I may be permitted.

The CHAIRMAN. Certainly; go ahead.

Senator POMERENE. Professor, you did the principal part of the work in drawing both of these bills?

Mr. WILLISTON. Well, I did the original work in drawing the Pomerene bill, and then it was whittled over by the conference.

Senator POMERENE. And you have had this matter before you for quite a number of years, investigating the subject?

Mr. WILLISTON. That is true.

Senator POMERENE. Which one of these bills would you prefer?

Mr. WILLISTON. That obliges me to state my position, perhaps, a little more at length than in a single yes or no to your question.

Senator POMERENE. I should like you to state it fully and give your reasons for your position.

Mr. WILLISTON. I think the Pomerene bill, as Senator Cummins has said, is a complete code, and it is intended to be a beneficial code covering the subject of bills of lading. I think it would be an advantage to have the same code in regard to interstate and foreign bills that there is in regard to State bills. I think the Pomerene bill covers all the evils included in Senate bill 957, and also covers some more. Were it not, therefore, for two matters, the people whom I represent, and I myself, would have no hesitation in saying that we prefer the Pomerene bill. But there are two matters which oblige us to qualify that statement very materially.

The first is a possible fear as to the constitutionality of all of the provisions of the Pomerene bill which I have alluded to, and a fear, not only of the actual constitutionality but a fear that the opponents of the measure may have a better handle to argue against the bill, because of real or supposed unconstitutionality, than in the smaller bill, Senate 957.

We also have been advised, since I have spoken to you last, Senator Pomerene—we have been advised by certain Members of the House of Representatives interested in the promotion of the Stevens bill, as it then was in the last session, that it would almost certainly be impracticable to get through the committee, which was a somewhat divided

committee—originally on the Stevens committee—to get through the committee and the House of Representatives the longer bill, Senate bill 4713. Therefore, as the safer measure, the one which is likely to give us relief as to the thing we most vitally need, we prefer Senate bill 957.

Senator POMERENE. Are you able to state what the objections are which are urged by the House Members either against bill 957 or against bill 4713?

Mr. WILLISTON. I have filed as part of my original argument, the committee report, which contains an elaborate minority report, mostly concerned with questions of constitutionality, but partly also urging the injustice of making railroads liable on negotiable or quasi-negotiable instruments, when their true business, it is said, is only to carry goods for hire.

I suppose, further, that it is the elaboration, and the greater number of provisions in Senate bill 4713 that make our advisors in the House of Representatives feel that there will be so many points to fight over that the battle is likely to be lost.

Senator POMERENE. The constitutional objections which are raised to the two bills are similar in character, as I understand it?

Mr. WILLISTON. Senate bill 4713 would certainly be open to any possible constitutional objection that Senate bill 957 is open to. But I fear that it might be open to certain added arguments with reference to the sections to which I have alluded. I feel no certainty that those objections are sound, but I do feel that there is possibility of argument there.

Senator POMERENE. The constitutional objections, then, would differ as to numbers rather than as to the character of those objections?

Mr. WILLISTON. I think there is a little different kind of objection possible, in regard to the sections of the Pomerene bill that deal with transactions between what I have called A and B, outside persons, a buyer and a seller of a bill of lading.

Senator POMERENE. I think that is all.

The CHAIRMAN. I wish to say to those who are present, that there need be no delicacy about discussing Senate bill 957, because it happens to bear my name. In order to have this subject before the committee in some formal, regular manner, as chairman of the committee, I introduced a bill. Therefore, there need be no delicacy in discussing these bills, simply because one bears Senator Pomerene's name and the other bears my name.

Senator POMERENE. I indorse everything that Senator Clapp says. We are all interested in doing the right thing.

Senator BRANDEGEE. I should like to ask this question. I am not familiar with the matter. I notice on page 14, line 17:

That a person to whom a bill has been transferred but not negotiated acquires thereby as against the transfer or the title to the goods, subject to the terms of any agreement with the transferor.

Does that contemplate the transfer of a negotiable bill?

Mr. WILLISTON. It contemplates two cases: Either the transfer of a nonnegotiable bill or the transfer without indorsement of an order bill. The act distinguishes between negotiation and transfer. Negotiation is the indorsement of an order bill by the person to whom it runs. Transfer is anything else; that is, it is the handing

over, either indorsed or unindorsed, of a straight bill, and it is also the handing over unindorsed of an order bill.

Senator BRANDEGEE. That is the point I want to hear you on. Does the title pass by the physical transfer of the bill itself, if it is a negotiable bill, without an indorsement?

Mr. WILLISTON. No; an indorsement is necessary to strict legal title. But the handing over of a document itself entitles the person to whom it is handed over to have the indorsement of the person who hands it over.

Mr. JAMES. What is meant by the word "acquire" in your amendment?

Mr. WILLISTON. Pardon me, but I so not think Senator Brandegee is through.

Mr. JAMES. Oh, I beg your pardon.

Senator BRANDEGEE. I had finished, if you have.

Mr. WILLISTON. If I have made myself clear, that is the explanation.

Senator BRANDEGEE. I do not care to pursue it, but would the finding of an order bill by a party give the finder a title to the property?

Mr. WILLISTON. Finding an indorsed order bill?

Senator BRANDEGEE. No; finding an unindorsed order.

Mr. WILLISTON. No; that would not give him any rights.

Senator BRANDEGEE. Would that be a transfer under the language of this act?

Mr. WILLISTON. No. I should not say the finding would be a transfer.

Senator BRANDEGEE. Is it customary in trade to transfer order bills of lading by handing them over to a person without indorsement?

Mr. WILLISTON. It is not customary, but it sometimes does happen, just as it happens in regard to bills of exchange or certificates of stock. It seemed necessary in what was intended for a complete code of bills of lading, as Senator Cummins justly characterized it, to make a provision for that possibility. A similar provision is made in the negotiable instruments law for a corresponding situation with regard to bills of exchange or promissory notes.

Senator BRANDEGEE. That is all.

Mr. JAMES. I want to ask you, in connection with the question that Senator Brandegee asked, this: On page 3 of the substitute for Senate bill 957, which says that the carrier "shall be estopped, as against the consignee in case of a straight bill of lading and as against the consignee and every other person in the case of an order bill of lading, who shall acquire any such bill of lading." There is no definition of "acquire;" as to how the acquirement shall be obtained.

Mr. WILLISTON. In good faith and for value. That, to my mind, relegates the question of what those notes mean to the State law governing the question.

Mr. JAMES. It would be in the power of the State to abrogate this law by defining some method of acquirement?

Mr. WILLISTON. The State law might say that "acquire" meant one thing in one State and another thing in another State. That is, just as in the bankruptcy law. The national bankruptcy law takes the ownership of property by the bankrupt just as the State law defines it. Yet his ownership under the State law is ownership for the purpose of the national bankruptcy law.

The CHAIRMAN. I think we will proceed now, because in the end the committee, and then afterwards the court, has to construe these words anyway.

Who is the next witness?

Mr. WILLISTON. Mr. Horne.

There being no further questions, Mr. James was thereupon excused.

The article from the *Traffic World* and *Traffic Bulletin*, referred to by Mr. James in his statement, is as follows:

DEFINING BILLS OF LADING—SENATOR POMERENE'S COMPREHENSIVE MEASURE COVERING THEIR USE IN FOREIGN AND INTERSTATE COMMERCE.

THE TRAFFIC SERVICE NEWS BUREAU,
Washington, D. C., February 9.

Two weeks ago Senator Pomerene, from Ohio, introduced the most comprehensive legislation yet brought to the attention of Congress on the subject of "Bills of lading in commerce with foreign nations and among the several States" as expressed in the title to Senate bill 4713. This bill was referred to the committee on interstate commerce.

Section 1 provides that bills of lading issued by any common carrier for the transportation of goods from a place in a State to a place in a foreign country or from a place in one State to a place in another State shall be governed by the act. The bill recognizes the well-defined usage and custom of business by classifying bills of lading either as "straight" or "order." Section 4 defines a "straight" bill of lading and also defines it as "non-negotiable." Section 5 defines an "order" bill of lading and also defines it as "negotiable."

NEGOTIABILITY OF ORDER BILL OF LADING.

In harmony with actual and universally recognized usage and custom throughout the commercial world, and as has already been recognized by common-law decisions and statutes in many States and by the commercial codes of foreign countries, an order bill of lading is made fully negotiable by section 31. Many other sections enforce the principle of negotiability, such as section 24, which forbids attachment unless the order bill of lading is surrendered or its negotiation enjoined; section 26, freeing the goods from liens against which an order bill of lading is issued except freight, storage, demurrage, terminal and coopersage charges, unless specified on the face of the bill of lading. Not only is negotiability of the order bill of lading recognized in a legal sense but also in a commercial sense by the provision of section 53 in the definition of "value." Value is there defined as any consideration sufficient to support a simple contract, and it is declared, in harmony with the great and leading case of *Swift v. Tyson*, that an antecedent or pre-existing obligation, whether for money or not, constitutes value where an order bill of lading is taken either in satisfaction thereof or as security therefor, and in the further definition of "good faith," which is defined to mean when, in fact, done honestly, whether it be done negligently or not. The actual commercial usage of an order bill of lading accompanying a draft is set forth in sections 40 and 41. The order bill of lading, being thus made both legally and commercially negotiable, is recognized as an important instrument of interstate and foreign credit and particularly, when accompanied by a draft, becomes "commodity currency," the unit of quantity being represented by the order bill of lading and the unit of value with the dollar mark by the draft.

ALTERED BILLS OF LADING.

The danger of turning a straight bill of lading into an order bill of lading by inserting the word "order" before the name of the consignee is guarded against by requiring the words "order of" to be printed as set forth in section 2. The rights of a holder of a bill of lading in good faith is further protected by section 16, which provides that where a bill of lading has been altered the holder in good faith shall have a right to enforce it according to its original tenor.

So that no person shall be misled in taking a straight bill of lading for an order bill of lading, section 8 requires that a straight bill of lading shall have placed thereon the word "nonnegotiable." So that there shall be no misunderstanding, it provides that this section shall not apply to memoranda, which is usually a shipping order.

The practice of issuing order bills in parts or sets has nearly disappeared in domestic commerce, and section 6 sets its mark of disapproval upon this practice except in

transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries. Section 7 fixes the liability for so doing with the exceptions just noted, and section 18 provides that the word "duplicate" shall mean only that it is a copy.

LOST OR DESTROYED BILLS.

In the case of a lost or destroyed order bill of lading, section 17 provides a remedy for replacing the same. Spent order bills of lading have been a menace because of the delivery up of goods by carriers without the surrender of an order bill of lading. Another evil has been that where an order bill of lading has been surrendered, some employee of the railroad has negotiated the same. Both of these evils are guarded against by the provisions of section 14, which require that on delivery of the goods, not only should an order bill of lading be surrendered, but actually canceled. Section 15 covers the case of partial delivery by a carrier on a delivery order by requiring an indorsement of the partial delivery or a surrender and cancellation of the entire bill.

ACCOMMODATION AND FRAUDULENT BILLS.

Outside of the provisions making the order bill of lading negotiable in both a legal and commercial sense, the provisions of section 23, protecting the innocent purchaser for value of an order bill of lading when issued either for the accommodation of a shipper or fraudulently, are the most important of the bill. It recognizes and restores the ordinary "rule of agency" that a principal is liable for the acts of his agent within the apparent scope of his authority, and that the principal is not excused from liability because of restrictions on that authority. This provision is so important that we repeat it, as follows:

"That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee, the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to (a) the consignee named in a nonnegotiable bill, or (b) the holder of a negotiable bill who has given value in good faith, relying upon the description therein of the goods for damages caused by the nonreceipt by the carrier or a connecting carrier of all or a part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue."

This section then safeguards the carrier when marked "contents unknown" and "shipper's load and count."

LEGAL INCIDENTS.

The bill having seized upon the bill of lading at an "instrument" of interstate and foreign commerce, follows it to its logical consequence by defining the incidental rights and obligations of those who deal with it, as may be found in sections 2, 3, 9, 10, 11, 12, 13, 19, 20, 21, 22, 27, 30, 34, 35, 36, 37, and 39.

In view of the fact that a number of States have enacted statutes similar to this bill and may construe the same before the Pomerene bill becomes a law, a new rule of statutory interpretation and construction has been inserted as follows:

"This act shall, as far as practicable, be interpreted and construed in harmony with the law of those States which enact an act of similar import to make uniform the laws of the various States on bills of lading."

DOES NOT COVER RESTRICTIONS ON COMMON-CARRIER LIABILITY.

The bill is, in the true sense, a measure covering bills of lading and does not cover the subjects of limitations on the common-law liability of common carriers. The Pomerene bill must not, therefore, be confounded with the uniform bill of lading or the provisions of the Carmack amendment or the provisions of the Harter act.

Five sections of the act provide for criminal actions for its enforcement. It will be noticed that by these sections crime is made personal and the penalties are not visited on the corporations to be ultimately paid for by the shippers, but are imposed upon the shippers who violate the act and upon the officers of the common carriers.

STATEMENT OF FRANK A. HORNE, PRESIDENT OF THE MERCHANTS' REFRIGERATING CO., NEW YORK CITY, N. Y.

The CHAIRMAN. State your name, residence, and occupation.

Mr. HORNE. Frank A. Horne, president of the Merchants' Refrigerating Co.; 161 Chambers Street, New York; chairman of the cold-storage committee of the American Warehouse Association, and

member of the New York Mercantile Exchange, both of which bodies have expressed an approval by resolution of this legislation.

Mr. Chairman and gentlemen of the committee, I desire to speak in favor of Senate bill 957, particularly that section which provides liability on the part of the carrier for statements contained in its bills of lading.

Our business is the business of cold-storage warehousemen for hire. Our own company has a capacity of about seven and one-half million cubic feet of cold space for the purpose of receiving perishable products coming from the Middle West and the coast for account of local dealers and largely for account of western shippers and owners. For the most part our business is with local dealers in the city of New York and vicinity, but they in turn receive these products on consignment—they are commission men mainly—by means of a bill of lading.

It is estimated in the various public cold-storage houses of the country that from 5 to 10 per cent only of these products are carried in warehouses from the period of flush production, carrying the surplus until the time of national scarcity. Therefore, what I shall say with reference to that small proportion of the goods which we as warehousemen handle refers more largely to the business of the commission man and the receiver.

Last year I figured that we received about 2,000 cars from the West. Most of those cars came to us with bills of lading, and drafts were made. It is our custom to make loans both to the local trade, they having taken up the drafts of bills of lading—they come to us and present a negotiable warehouse receipt as a basis and collateral for such loans—but in the case of the western shippers who ship from the great Central States butter, eggs, poultry, green fruit and dry fruit, we are in the habit of paying sight drafts with bills of lading attached to protect ourselves until such times as the goods arrive. We are able to secure an indorsed negotiable warehouse receipt as security for our advances.

Now, as you are doubtless aware, these products, particularly eggs, poultry, and butter, come from a large number of smaller operators in those Western States, and we feel that it is quite necessary for us to be assured in paying these drafts, representing, we will say, 75 per cent of the market value, that the statements contained on those bills of lading shall be a statement of fact, and that men may rely upon them as protection for further advances and be equally as representative of value as our own negotiable warehouse receipts. In other words, that they shall actually represent in number of packages, at least, the goods represented to have been shipped.

I desire to make the point that if the bill of lading be strengthened, and if the handlers of this document, both warehousemen and commission merchants—the banks have a stronger security, and thereby the smaller shipper will be encouraged to do business with us. As it is to-day, unless we know somewhat of the responsibility of the shipper, we are prone to decline to pay drafts on bills of lading, and state that we will not make advances until the goods have been actually received, and we state, "You may draw on us with bill of lading attached, payment to be subject to the arrival of the goods."

Now, then, the small shipper in the West is unable to wait for that period of time. He wishes—he has not much capital—to secure money on those bills of lading from the local bank to enable him to

transact his business and ship his product so that the draft shall be paid on presentation with bill of lading attached, without delay, he getting his money from the local banks immediately on presentation of the draft and the bill of lading.

It seems to me, therefore, Mr. Chairman and gentlemen of the committee, that the passage of this act will enable a larger number of smaller men to do business, and I think also that has a reference to the much-discussed question of the cost of living.

I think the more we can multiply the number of shippers and handlers of these food products in the West, the more we can encourage them to develop their business and send their products to the East and to the great markets, the more we can have them lay by their surplus stock so that in winter there shall be larger available food supplies and the lower will be the price of these food products, and the chances of control by the larger interests will be thereby lessened because of the multiplicity of the owners of those goods, both in the warehouse and as shippers.

I think that has been developed in a number of cases. The gentlemen of this committee who represent the Western States know that there are a large number of these men constantly coming up, doing business. The man who may be the manager, if you please, of a larger shipping interest, if he requires a little capital, is very apt to start up. He should be encouraged, because it permits and develops reasonable competition. This line of business he himself is inclined to store and keep and carry it in the warehouse for the winter market, and his goods come in competition with the goods of the large operators, and I am quite sure that the strengthening of this bill of lading would go a great way toward encouraging the situation.

Now, in conclusion, I desire to speak of this condition. Under the warehouse receipts act—which I understand has now been adopted as the law of over 20 of our States—the uniform warehouse receipts act, which, I think, was recommended by the Commission of Uniform State Laws—they, as warehousemen, and the warehousemen of the States who have adopted this law, are held to very strict accountability for their negotiable and nonnegotiable receipts covering the statement of facts. If my storekeeper issues a receipt, we as warehousemen are held for the statement, although the goods may not have been delivered to him, and we can see no reason why the carriers should not be held to a like accountability, especially in view of the fact that the bill of lading and the negotiable property or the warehouse receipt are both similar in their relationship, and we are bound to consider the bill of lading as the basis of our credit and advances just as we are bound in our business to accept the warehouse receipt as the basis of our loans, and we believe that it would strengthen the free and easy movement of commerce if the two documents were on a parity with regard to their protection to the holder by the warehousemen, commission merchants, or bankers.

That is all I have to say, Mr. Chairman. If there are any questions, I will be pleased to answer them.

Senator CUMMINS. May I inquire just a little further about the relationship between the warehouse receipt and the bill of lading? When the sight draft is drawn upon the commission man, accompanied by a bill of lading, it of course arrives some time in advance of the goods?

Mr. HORNE. Yes, sir.

Senator CUMMINS. Do your warehousemen issue warehouse receipts upon the bill of lading or before the arrival of the goods?

Mr. HORNE. No, sir; we are not permitted so to do by law, and we do not do it. We only issue the warehouse receipt upon the actual receipt of the goods. But in the interim we have to hold the bill of lading as our security for the advance.

Senator CUMMINS. Then, so far as the warehouse receipt is concerned, it plays its part in commerce without any regard to the receipt of the goods?

Mr. HORNE. Exactly.

Senator CUMMINS. That is, with regard to the bill of lading, because you do not issue the warehouse receipts until the goods are actually in your warehouse?

Mr. HORNE. That is true.

Senator CUMMINS. Is it the custom of you merchants to borrow money at the banks simply upon the bill of lading, or do you borrow on the warehouse receipts?

Mr. HORNE. Well, on the warehouse receipts for the most part. I imagine the commission merchants who receive these products may use the bills of lading as collateral. I am quite sure that they do in some cases. In our own case we pay drafts on those bills of lading and carry those loans ourselves until such time as the goods arrive, and we have the papers, the negotiable receipts, indorsed.

Senator CUMMINS. In the warehouse-receipt act, however, there is nothing that authorizes or permits warehouse receipts to be issued before the receipt of the property?

Mr. HORNE. No, sir; there is a penalty attached for doing that.

Senator CUMMINS. That is as I remember it.

Mr. HORNE. Yes, sir.

Senator BRANDEGEE. Are you able to state what percentage of loss you incur under the existing law by reason of attaching these drafts and not having the goods turn up?

Mr. HORNE. Our concern has met with no direct loss; but there have been numerous instances on the part of our customers, the commission men. Mr. Dowie, one of our customers, yesterday cited three cases. I know of a number of other similar cases on the part of the commission men who are handling these products.

Senator BRANDEGEE. There are instances, and I wondered if anybody was able to state what percentage of loss on the business transacted he was subjected to under the present law.

Mr. HORNE. I can not answer that. It is the doubt that is thrown over the instruments that makes them insecure, as we look at it.

Senator BRANDEGEE. But at present the business goes on, does it not? You do continue to cash the bills of lading, pay in advance, and take the chance of receiving the goods?

Mr. HORNE. Yes, sir; but it leads us to scrutinize the strength of the party with whom we are doing business; and, even so, there is a risk which we feel should be eliminated, if possible.

Senator BRANDEGEE. You think that is a very bad thing for the business community to have scrutiny applied to the standing of the parties?

Mr. HORNE. No; it is a good element; but as warehousemen we are advancing on the goods, and we prefer to make our advances on goods and not on credit. We are not bankers, and therefore we want the document which represents the goods to be valid and sure.

Senator BRANDEGEE. Is there any loss except where the bill of lading is issued by the railroad company's agent without the goods having been received by the railroad?

Mr. HORNE. That is the main difficulty.

There being no further questions, Mr. Horne was thereupon excused.

STATEMENT OF FREDERICK H. PRICE.

Mr. PRICE. Mr. Chairman and gentlemen, I shall occupy but about 10 minutes. The millers of this country do their entire business on an order bill of lading, with some few exceptions, the mills who have their own offices in the East, and they must depend absolutely upon those bills being perfectly valid, otherwise the whole fabric of their business would be impaired.

I shall not consume your time by citing all the instances, but will content myself by suggesting two instances that are indicative of the general situation. In the meantime, I will say that last June at the millers' convention, under the auspices of the federation, the following resolution was adopted after they had discussed the Stevens bill, now No. 957 of the Senate. The resolution is as follows:

The Millers' National Federation hereby indorses the bill now before Congress, H. R. 4726, otherwise known as the Stevens bill, or any other bill having for its object the establishment beyond doubt the responsibility of common carriers for the acts of their agents.

The whole export business is also done on order bills of lading, and therefore I urge that any bill enacted by Congress shall include in it a provision extending to foreign commerce.

I will speak of two instances, one referring to shipper's load and count, which was spoken of yesterday, and the other referring to the failure to receive goods upon the issuance of the bill of lading.

"Shipper's load and count" is a clause almost universally used in our business. The shippers do load the cars. Their mills are frequently some few hundred yards away from the office of the railway agent. The agent is called upon to furnish an inspector to count the number of sacks or barrels of flour in a car. He does not come, and the carrier insists on indorsing the bill of lading: "Shipper's load and count." The case in point was where a shipment on an export bill of lading for 1,000 bags was made, or at least the document was issued for it, and at London only some 300 sacks turned up. The initial carrier said, "We are not responsible." It was shown that he never got all that flour.

Senator POMERENE. Who never got it?

Mr. PRICE. The initial carrier never got all the flour, although he issued a bill of lading for a thousand bags, and to-day the bill is not paid and my clients are out that much money.

That was shipper's load and count. The trouble was the carrier would not check the number of sacks in the car, and there was some labor troubles at the point of shipment, and I do not know how it came about. No one seems to know.

Another case was in St. Louis, where a shipment of flour was made to St. John's, Newfoundland. The shipper of the flour ordered an order bill of lading. The same form is used for both, order and straight. The words only indicate the nature of the bill, and by mistake the initial carrier omitted the words "To order of" and made the shipment a straight bill of lading.

That document was taken to the bank in the usual manner, and no one noticed that it did not contain the words "to order of." The document went to St. Johns, Newfoundland, and so did the flour. When the delivering carrier at St. Johns saw that the document was a straight document, he delivered the flour to the consignee without asking for surrender of the bill of lading, and the consignee did not pay the bill and has not paid it yet. That was over a year ago. That was over \$1,000.

You will be surprised at the large number of cases that arise in the course of a year of short shipments, where the carrier denies liability chiefly under the shippers' load and count clause. I am therefore pleased to notice that while that condition is taken care of, the words "if true" are inserted. "If true" is a very valuable thing, and I urge in the interests of my clients, the millers, that this bill, S. 957 and H. R. 4726, be adopted by Congress.

That is all I care to say, gentlemen.

The CHAIRMAN. Now, in those two cases that you cite, it was a fact, was it not, that the carrier did not count? Take the flour that you first referred to.

Mr. PRICE. No, sir; he did not count.

The CHAIRMAN. Then you say the important words are "if true." You mean those words, of course, refer to the recital "shippers' load and count"?

Mr. PRICE. Yes, sir.

The CHAIRMAN. In the other case you refer to, was there any question but what it was "shippers' load and count"?

Mr. PRICE. No, sir; the other case I referred to was straight bill of lading. The provision in this bill which defines both kinds of bills of lading is a wise provision. In the first case the shipper called for an inspector to count the number of sacks, and he declined.

The CHAIRMAN. If the goods were loaded and counted by the carrier would the shipper as a rule receive a bill of lading containing the discrediting words "shippers' load and count"?

Mr. PRICE. No, sir; but if the shipper loads his car and calls for a count on the part of the carrier he generally gets a document marked "shippers' load and count," just the same.

The CHAIRMAN. Where the carrier actually counts?

Mr. PRICE. Whether he does count, or whether he was called upon to count and did not turn up.

The CHAIRMAN. If he were called on to count and did not count, then he would get no other document?

Mr. PRICE. No, sir.

The CHAIRMAN. But if the shipper did count, would the carrier accept a bill of lading with the discrediting statement—and of course it does discredit it for value—of "shippers' load and count"?

Mr. PRICE. You mean, do you not, would the shipper accept?

The CHAIRMAN. That is what I say.

Mr. PRICE. The shipper would have to accept. He always has had to accept that document in spite of his protests with the one clause "shipper's load and count." I never saw a document marked "shipper's load."

The CHAIRMAN. No; load and count.

Mr. PRICE. And count.

The CHAIRMAN. Yes. Now, you say it is the practice of shippers in accepting a bill of lading marked "shipper's load and count," to count when the carrier has counted?

Mr. PRICE. Very frequently; yes, sir.

The CHAIRMAN. Can he use that at a bank under existing conditions as well as he can a bill of lading that does not contain that?

Mr. PRICE. No, sir.

The CHAIRMAN. I should suppose not. And yet you say in the course of business now the shipper frequently accepts that, where the carrier has actually loaded and counted?

Mr. PRICE. No; where the shipper has loaded and the carrier has been called on to count and does not count.

The CHAIRMAN. Of course that would be the natural thing, but he would accept it then, would he?

Mr. PRICE. Yes, sir.

The CHAIRMAN. Now, what I am getting at is, is it the course of business to-day for shippers to accept a discrediting bill of lading containing the recital "shipper's load and count" where in fact the carrier has loaded and counted?

Mr. PRICE. Oh, no, sir; not so far as that.

The CHAIRMAN. Then, practically, you would hardly have a case where a bill of lading contained the recital "shipper's load and count" where in fact the carrier had done the loading and counting, would you?

Mr. PRICE. No, sir; we never have that.

The CHAIRMAN. That is what I supposed, and I have been unable from the start to see the benefit of those words.

Mr. PRICE. Well, they are of benefit to the carrier; but they are not much good to us except that we are obliged under circumstances to load our own cars because there is no other way of loading them, where we can not get them loaded for us by the carrier.

The CHAIRMAN. In that case the recital would be true, would it not?

Mr. PRICE. Yes, sir.

The CHAIRMAN. Now you say the shipper would not—and I would not suppose a shipper would accept a bill of lading discredited with the recital "shipper's load and count" when the carrier had himself loaded and counted?

Mr. PRICE. No, sir.

The CHAIRMAN. So practically, wherever the bill of lading contains that discrediting statement "shipper's load and count" it is true that it is the shipper's load and count?

Mr. PRICE. Yes, sir; as a rule.

Senator CUMMINS. Mr. Price, if that be true, what good would this bill do you?

Mr. PRICE. It does all these things; it defines the order bill of lading.

Senator CUMMINS. I mean now as to the case you put before us. You lost some money, or your people lost some money because the goods were not shipped that were supposed to be shipped. If this bill had been in force they would have lost the money just the same.

Mr. PRICE. Yes, sir; but I claim this, that in this particular case, for example, we proved by affidavit and by record that the flour was loaded in the car and the document issued for it was a true document for a thousand barrels.

Senator CUMMINS. But that does not meet the case. If you allow

"shipper's load and count" then the carrier is not liable to the consignee or to the indorsee of the bill of lading if the goods described in the bill of lading are not delivered. In other words, it does not change the law at all in that respect.

MR. PRICE. No, sir; the law does not change it, except we hold, by practice, that where we can support the loading by affidavit, and we ask for an inspector to check the load, and he will not come, that we should not have received the document marked "shipper's load and count" which was not true.

Senator CUMMINS. That may be very true, but the bill does not protect you at all in such a case as that?

MR. PRICE. No, sir; not at all. It goes as far as I think it can go.

Senator CUMMINS. No; a bill could go far enough to forbid a carrier from issuing any such bill of lading, I suppose, and require the carrier to count, so that he must issue a bill of lading, or it may issue a bill of lading, upon its own responsibility.

MR. PRICE. Yes, sir; I would like to see that done if it could be done, very much.

Senator CUMMINS. The point that I had in mind is this: You have recited an instance in which your clients were injured, and I assume that this bill was intended to prevent the recurrence of such injury. Now, as I look at it it would not do it at all.

MR. PRICE. It would not in that particular case, except, as I state, that in the case of a contest we would use the words "if true," and say it was not true, and that it was a shipper's load and count.

Senator CUMMINS. If the carrier does not count, it is a true statement. If the carrier neither loads nor counts, then the statement is true.

MR. PRICE. Yes; it would be true.

Senator CUMMINS. Even though the carrier ought to have counted and did not?

MR. PRICE. Yes, sir; it would be true.

Senator CUMMINS. Then, it does not seem to me the bill helps you a particle—I mean as to that character of transaction. It may help you with regard to those that are not marked—those bills of lading that are not marked, "Shippers' load and count."

MR. PRICE. Fortunately the large majority of our shipments are not marked "Shippers' load and count." It happens frequently enough, however, to create annoyance, but it does not affect the majority of the business.

Senator CUMMINS. I thought you said the great majority of your shipments were on bills of lading marked "Shippers' load and count."

MR. PRICE. No; I meant to say on order bills of lading. If I said that I did not mean it.

Senator CUMMINS. What proportion of your business is transacted upon bills of lading of that kind?

MR. PRICE. Marked "Shippers' load and count"?

Senator CUMMINS. Yes.

MR. PRICE. It is hard to say, but only in some cases. I should say, possibly one-third, would be on shippers' load and count. I do not know that positively. It is only a guess.

Senator CUMMINS. You say you never saw a bill of lading marked simply "Shippers' load"?

MR. PRICE. No, sir.

Senator CUMMINS. The two things are always combined?

Mr. PRICE. Yes, sir.

There being no further questions, Mr. Price was thereupon excused.

The CHAIRMAN. Have you any other gentlemen who desire to be heard by the committee?

Mr. WILLISTON. We have no other witnesses at present, but if at the postponed hearing, when the railroads put in their case, any new facts develop we might like an opportunity to reply. We could have multiplied the number of witnesses, but it seemed to us unnecessary. We think that those who have appeared before the committee have sufficiently shown the character of the evil.

I would like to say a single word with regard to the proviso which has given rise to a good deal of discussion and trouble at this hearing. This proviso is, of course, inserted in fairness to the carriers. It is nothing that the people whom I represent want. They would prefer by a great deal to have a flat obligation on the carrier, turned up with the goods, whatever sort of words may be used in the description, or whether the bill would be marked "Shippers' load and count" or not. But in the discussion of this question, both in connection with the State bill and before the committee, when this bill was pending in the House, it became obvious that in many cases it was an unfair hardship on the carrier to require him absolutely to guarantee the delivery of goods when he had not any opportunity to know what the shipment contained, and therefore originally a brief proviso, which is put in brackets at the end of the roman print on page 3 of the paper in your hand, was put in the bill, and later by agreement with the railroad attorneys there was substituted the italicized proviso.

Senator CUMMINS. Mr. Williston, I can very easily see—speaking for myself alone—the necessity for some kind of limitation upon the liability of the carrier. I am not able to fully understand the application of the proviso, as it is here written, nor do I see that it will accomplish the purpose that you both have in view. Possibly, however, the railroad companies ought to be called upon to explain or elucidate that provision rather than your side. I am willing to take whatever course you deem best in the matter. I am not satisfied with that provision even though the general bill is found to be what it ought to be. I do not want to suggest how it shall be done or by whom it shall be done. Possibly Senator Faulkner would be the best man to explain that provision, inasmuch as you are entirely willing that it shall be eliminated.

Mr. WILLISTON. Yes.

Senator CUMMINS. I do not think that all the limitations should be eliminated, but I can see cases where there ought to be a limitation. I am not at all satisfied with the form that has been suggested.

Mr. FAULKNER. I will try when we come to explain the reasons, the absolute necessity for it. In the business, in order to facilitate the transportation of the commerce of the country, it is absolutely essential that a provision of that character should be included in any bill that is passed, otherwise I will be able to show to you that the business of the country, especially depending upon any order bill of lading, will be delayed from 24 to 48 hours in its whole commerce, depending upon an order bill of lading.

Senator CUMMINS. Do not understand me to say that there ought not to be. I just said there ought to be some limitation on the

you have hit upon the right limitation or the best way of expressing it. That is my present view.

Mr. FAULKNER. To be perfectly frank with the committee, I did not examine the language with that care perhaps that I will between now and the hearing of the railroads, but as this section as now incorporated in this bill by agreement was the exact language followed in the State bill that has been discussed by Mr. James we simply transferred it from the State bill to this bill as it covers generally the proposition that was in difference between us.

Senator CUMMINS. You would prefer to bring the matter up when the railroads are here?

Mr. FAULKNER. Yes, sir; when we can discuss it fully. This question has never been discussed before this committee fully at all—in fact, by either side, until to-day.

Senator CUMMINS. So far as I am concerned, I am perfectly willing that that should be done, because I think really the burden is upon the railroad companies to prepare suggestions with regard to such a limitation.

ADDITIONAL STATEMENT OF SOL WEXLER.

Mr. WEXLER. Mr. Chairman, will you allow me just one word before you close?

The CHAIRMAN. If you desire to discuss any feature of the bill, certainly.

Mr. WEXLER. I just want to make clear a few things that appear to be somewhat cloudy, and that is the relative status of the "to order bill of lading," and the straight bill of lading, and this question of the load and count.

Now, from the standpoint of a banker that does business with merchants dealing in every line of business, and therefore handles bills of lading covering every class of shipments, I am rather familiar with the practical side of this question. The provision of the shippers' load and count should mean in this act exactly what it says, that if a consignor accepts a bill of lading stipulating shippers' load and count, and there should be a deficiency in the count upon the arrival of the goods, he should not have any claim for such deficiency against the railroad, from my standpoint. If I were the holder of such a document, and had accepted it as my own count, unless there had been a wreck of this train carrying this merchandise, or some other extraordinary condition, I should certainly not feel called upon to go behind the contract which I had accepted and require the delivery in specific quantity of pieces and numbers when I myself had agreed that I had counted the merchandise that had gone in there; and the agent of the railroad had not been any party to that count whatever. Therefore, the words "if true" as used are intended to mean that if it is a fact that it was the shippers' load and count, the railroad is relieved from liability, but if it was not a fact, but it was a shipper load and count, he is then held liable. But I should think the burden of proof would be largely upon the shipper to prove that it was counted at the time, and I am almost inclined to believe that he should be estopped, because if he is fool enough to accept the bill of lading stating "shipper's load and count," when the agent had counted it, I should think he should be held responsible for his own acts.

I do not believe that it is the intention of any of the gentlemen advocating this bill to impose upon railroads any extraordinary or onerous conditions such as they are not willing to assume themselves.

Now, the straight bill of lading is simply a receipt for the goods, and the gentlemen in the cold-storage business who have spoken here to-day, when they pay their money out against a draft drawn against a straight bill of lading, have simply paid it out because they hold a receipt from the railroad that that quantity of merchandise has been delivered to them. But that is not in any sense a negotiable document. No banks that I know of will loan 5 cents on a straight bill of lading—not a nickel. No conservative bank will do it, because there is absolutely no control of the merchandise. It is consigned directly to some one else. That person to whom it is consigned receives the notice from the railroad that the goods have arrived, and that person can go and haul them and sell them, regardless of who may hold the bill of lading. Therefore that bill of lading is not a negotiable instrument and does not enter into the banking channels in any manner whatsoever. But you will readily see the necessity of the railroad company being bound if they give that receipt for the merchandise; otherwise, the person paying out the money against a draft predicated upon the fact that the goods were received by the railroad and having reasonable expectation that if they were received by the railroad they would be ultimately delivered to him, pays his money out on that and is entitled to the delivery of the goods, and the railroad should therefore be held responsible for these bills of lading the same as it would be for an order bill of lading.

Now, when we come to the order bill of lading, which is negotiable, and upon which the great commerce of the country is done, it is essential that that bill shall be invested with the highest degree of negotiability, and with the most absolute safety because the holder of that bill is almost invariably a perfectly innocent third party, being no party to the trade between the individuals but is the lender of the money predicated upon the bill, and if trouble arose, due to the carelessness or dishonesty of a carrier, then that carrier should be responsible.

That is the whole milk of the proposition, and if whatever bill you may finally decide to approve embodies the essentials that the railroads shall be responsible for the acts of their agents as expressed in the bill of lading, you have covered the whole case.

The CHAIRMAN. If a bill of lading was presented to you, containing the words "shipper's load and count," if you dealt with that at all, if you touched it, it would be upon the theory, and subject to the discredit of the belief in your mind, that it was the shipper's load and count.

Mr. WEXLER. Absolutely. I should be on notice.

The CHAIRMAN. Now then, when the shipper ships his goods he knows that a bill of lading containing the words "shipper's load and count" is discredited?

Mr. WEXLER. Precisely.

The CHAIRMAN. Each man who deals with it takes it subject to that discredit, whatever it may be?

Mr. WEXLER. Precisely.

The CHAIRMAN. And is it your observation that shippers very often accept a discredited bill of lading when in fact the carrier did load

Mr. WEXLER. It is only the custom in the shipment of certain lines of merchandise. But the custom is so well established that the shipper is entirely willing to accept it as a convenience to himself as well as to the railroad.

The CHAIRMAN. No; you do not understand my question at all. Is it the custom of shippers to accept a bill of lading discredited with the recital "shipper's load and count" when in fact the carrier has loaded and counted?

Mr. WEXLER. No, sir; it is not. I have never heard of a shipper ever accepting a document of that kind—never.

The CHAIRMAN. Then, if the shipper never, as a rule, does accept it; if the shipper, when he does accept it under those circumstances, knows that it is discredited; if all those who deal with it discredit it more or less, according to the circumstances, with that recital, do you not think it would be introducing an element of uncertainty in legislation here to use the words "if true?"

Mr. WEXLER. I do; yes, sir. I think it should be eliminated entirely. I think the railroad is entitled to the same protection that we have in that respect.

Senator CUMMINS. I have no further questions, I believe. My doubt has not arisen at all with regard to the provision you have just mentioned. It is the other provision that I am not fully able to understand.

Mr. WEXLER. What provision is that?

Senator CUMMINS. The one that precedes the proviso.

Mr. WEXLER. I would like very much to explain it if you will just indicate which one it is.

Senator CUMMINS. It is the provision which states as follows:

Provided, That if the property is described in an order or a straight bill of lading merely by a statement of marks or labels upon the property or upon packages containing it, or by a statement that the property is said to be of a certain kind or quantity or in a certain condition, or it is stated in any such bill of lading that packages are said to contain property of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown or words of like purport are contained in any such bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, etc.

Mr. WEXLER. In that clause I agree with my previous statement. I think the words "if true" should be stricken out. I think if a shipper is so improvident and regardless of his own interest as to accept a bill of lading that does not correctly recite the facts, he should be estopped from any claim at some future date when the facts can not be clearly ascertained. I think the shipper must bear some responsibility in this matter as well. If he comes forward with a quantity of merchandise of whatever character and the railroad issues him a bill of lading for it and describes it as something altogether different and he accepts that bill of lading, he is in the same position as a man who owes me \$500 and gives me a note for \$300 and I take it in payment of the debt.

Mr. WILLISTON. How about the bona fide purchaser of such a bill?

Mr. WEXLER. The bona fide purchaser is governed entirely by what is stated in the bill. He buys it with that notice before him, and he can not come back again and claim that it is contrary to the facts. He is estopped in the same way that he is estopped on any other negotiable instrument. The facts are before him. If he buys a note after maturity he is barred by everything that may have occurred

Senator FAULKNER. I would like to ask the witness whether he will not also explain to Senator Cummins the question of the necessity for the bill of lading designating the goods by certain marks, etc.

The CHAIRMAN. He went into that yesterday with reference to canned goods.

Senator FAULKNER. That is one of the questions that the Senator asked him. He insisted on the necessity of that as a matter of business.

Mr. WEXLER. The necessity of marks on certain merchandise is necessary because certain merchandise frequently becomes mixed at stations and can not be identified except by a particular mark. For instance, we will take cotton. There are certain marks that are generally used, for instance, ABC, or ADO, etc. There may be coming into New Orleans or Galveston on a particular day 10,000 or 15,000 bales of cotton. Each bale of cotton has a mark and a number, and that should be stated on the bill of lading. No conservative merchant or shipper of cotton will accept a bill of lading unless that mark is stipulated, because how could he go and identify and claim his cotton? If he is shipping canned goods, it should state "100 cases of tomatoes." Then, you know, when you go to the station you claim 100 cases of tomatoes. But you should not accept a bill of lading for 100 cases without stating what it is, because then you would not know what to claim.

Senator CUMMINS. The point arises with me, and I may illustrate it. Suppose I should separate this provision so that it contained but a single requirement—suppose I read it in this way:

Provided, That if the property is described in an order or State bill of lading merely by a stamp that the property is said to be of a certain kind or quantity, such stamp, if true, shall not make liable the carrier.

What does that mean?

Mr. WEXLER. That is not stated as entirely as it ought to be. That was intended to mean that if the quality of the goods contained in the case, or the quantity of small packages contained in the case, was stated in the bill of lading, and the railroad had no means of ascertaining whether that was true or not, and signed for it, that it was said to contain that quality and that quantity of smaller packages, that then the railroad is relieved from responsibility as to that quantity of smaller packages or that quality of merchandise, which responsibility they should justly be relieved of.

Senator CUMMINS. You do not get the full import of it yet. "*Provided*, That if the property is described," etc., "in the bill of lading by a stamp that the property is said to be of a certain kind or quantity." Now that must refer to what is said by the person who delivers it to the carrier?

Mr. WEXLER. Yes, sir.

Senator CUMMINS. Now if the statement is true, the carrier is relieved. Do you mean that if the statement made by the shipper to the carrier is true, or do you mean that if it is true that such a statement was made to the carrier that the carrier shall not be liable?

Mr. WEXLER. Well, I understand this to mean that the agent of the railroad accepts the statement of the shipper as being true, you understand, and the agent is subsequently estopped from claiming that any other merchandise from that which he described in his bill of lading is the merchandise that was shipped. I think the words

forward and takes a bill of lading describing merchandise altogether different from what it is he must stand by the description, if it is contained in the case which the railroad has no means of knowing the contents of.

Senator CUMMINS. Then what you mean is if the recital contained in the bill of lading, whatever it may be, is true, the carrier shall not be liable?

Mr. WEXLER. Yes, sir.

Senator FAULKNER. Is there not an almost universal expression in all bills of lading that if the goods are as to quantity, quality, and condition unknown?

Mr. WEXLER. Unknown, yes.

Senator FAULKNER. That is the usual expression, as I understand it, in all bills of lading.

Senator CUMMINS. We will wait, as far as I am concerned, to hear the railroads upon that proposition.

Mr. WEXLER. Let me say just one further word. We have been working on this bill for more than five years. It is more necessary that it should pass in the near future than at any time during the past five years because of the robberies committed by two firms in the South, aggregating nearly seven millions of loss, which was inflicted on New York bankers, exchange bankers, foreign bankers, and cotton merchants, partly through or largely through their own fault, because they dealt with irresponsible people. Those large losses have attracted the attention of the entire commercial world to this deficiency in our bills of lading and the careless manner in which railroads have signed bills of lading and have authorized their agents to act, knowing that they had no responsibility.

We are, therefore, in the position now of having a discredited document, a document which every man doing this line of business is looking around for some extraordinary relief from, and it is essential that something be done in the very near future.

Senator POMERENE's bill is an excellent bill. If that bill can be passed it is preferable, but if there is danger of its not being passed, or the House not passing it, it will be infinitely better if we can pass the one which we are more certain to pass, so we will be at least on the right road.

The CHAIRMAN. Is there anyone else who desires to address the committee?

Mr. WILLISTON. We have no other witnesses.

The CHAIRMAN. Two weeks from yesterday, at 10.30 o'clock, the committee will resume the consideration of this subject, and those opposed to the measure are invited to be present.

Senator POMERENE. Mr. Chairman, these hearings came on yesterday without it being generally known that these bills would be taken up, and I am advised that there are some grain dealers in the West who would like to be heard at the time we resume the hearings on this subject. I assume that they will be invited to be present.

The CHAIRMAN. Certainly.

Mr. WEXLER. May I ask at the coming meeting, when the railroads are heard, if any rebuttal argument will be heard on the other side?

The CHAIRMAN. Certainly; we want to hear both sides on this question.

The committee thereupon took a recess until Friday, March 1, 1912 at 10 30 o'clock a. m.

BILLS OF LADING.

FRIDAY, MARCH 1, 1912.

COMMITTEE ON INTERSTATE COMMERCE,
UNITED STATES SENATE,
Washington, D. C.

The committee met at 10.30 o'clock a. m.

Present: Senators Clapp (chairman), Nixon, Brandegee, Townsend, Foster, Newlands, Clarke, and Pomerene.

The CHAIRMAN. The following telegram from Edmund J. Clenny, president New Orleans Cotton Exchange, will be inserted in the record:

NEW ORLEANS, LA., February 29, 1912.

Senator MOSES E. CLAPP,
Chairman Interstate Commerce Committee, Senate Building,
Washington, D. C.

The practice by agents of railroads of issuing bills of lading for cotton not in hand and as acts of accommodation to favored shippers conjoined with the denial by said railroads of responsibility for the acts of their agents has been largely instrumental in producing conditions from which great frauds have grown, with resultant loss to individuals and reproach to the American cotton trade. Certain foreign cotton buyers and financial institutions, both at home and abroad, who have recently suffered huge loss through fraudulent lading documents, have made a determined effort to protect themselves from the consequences of the lax system which has heretofore prevailed. This effort is entirely justified by the facts, but the interests in question have given their effort the wrong application instead of seeking to apply the remedy to causes they are endeavoring to analyze effects instead of demanding that the issuance of bills of lading be safeguarded by placing responsibility therefor upon the carrier which performs the office and receives the profits of carriage they urge a cumbersome system of surveillance of bills after they have been issued and launched into the channels of trade. The central validating bureau plan proposed by these interests, which plan the American cotton trade has indignantly and thus far successfully opposed, would place all American shippers responsible, as well as irresponsible, under the burdensome, galling, and unnecessary compulsion of validating their bills through the central agency referred to, while at the same time confirming the railway carriers in their evasion of just responsibility for the acts of their own agents and encouraging said agents to persist in lax, injurious, and potentially fraudulent practices. The logical remedy for the abuses in the through cotton billing system lies not in penalizing reputable and honest shippers, but in compelling the carriers to assume the responsibility, which under every consideration of justice, equity, and fair dealing, they should bear. This consummation is of vast importance to the cotton trade, and therefore in this behalf the New Orleans Cotton Exchange respectfully urges the favorable consideration and ultimate enactment into law of the Stevens bill or some similar measure making railway carriers responsible for the acts of their agents.

EDMUND J. CLENNY,
President New Orleans Cotton Exchange.

The CHAIRMAN. The following letter from the American Hominy Co., Indianapolis, Ind., will be inserted in the record:

AMERICAN HOMINY Co.,
Indianapolis, Ind., February 27, 1912.

Hon. MOSES E. CLAPP,
Chairman Senate Committee on Interstate Commerce,
Washington, D. C.

SENATE BILL No. 957; HOUSE OF REPRESENTATIVES No. 4726.

DEAR SIR: We desire to call your attention to the last paragraph of section 4, which reads as follows:

"The carrier may also, by inserting in any such bill of lading, the words 'shipper's load and count,' or other words of like purport indicate that the property was loaded by the shipper and the description made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the property in the bill of lading."

Under this rule the carrier would not be liable for damage caused by improper loading, or by nonreceipt or misdescription of the property described in the bill of lading.

DAMAGE CAUSED BY IMPROPER LOADING.

It has been held heretofore, and properly so, that a car sent to a mill for the purpose of receiving and transporting freight should be in such a condition as to carry that class of merchandise in safety.

It has been held heretofore, and properly so, that a shipper loading freight into a car does so as the agent of the carrier, and that the carrier is liable for damage to merchandise so loaded, if caused by reason of the unfitness of the car.

It is true that we use reasonable care and go to some expense in seeing that these cars carry our merchandise to final destination in good order. Nevertheless, it happens frequently enough that damages are caused by the unfitness of the cars in spite of the care we take in loading freight.

DAMAGE CAUSED BY NONRECEIPT OF MERCHANDISE.

It is more or less a custom in the milling business, and probably in other businesses, for shippers to load and count their shipments into cars, without the supervision of the carrier or carrier's agent. It is nevertheless true that the shipper does in a majority of such cases, and at any rate he may do so, if he does not, call for a corroborating check of the count by the agent of the carriers, which being refused by the agent of the carriers, should not inure to the benefit of the carriers.

In other words, the shipper should not be required, and particularly not forced, to accept a bill of lading indorsed "Shipper's load and count," if he has requested the agent of the carriers to check the count and the agent has refused.

DAMAGE CAUSED BY MISDESCRIPTION OF THE PROPERTY DESCRIBED IN THE BILL OF LADING.

No shipper should object, we think, to this exception.

Generally speaking, we do not seek to impose upon the carriers any undue or improper burden of liability. If we accept without protest a bill of lading containing this discrediting clause, "Shipper's load and count," or words to that effect, we should not expect to hold the carrier liable for errors and omissions in our loading and counting, but where we go on record as demanding that a car be sent to us properly equipped and fit for the traffic intended, and where we go on record as demanding that our count be verified and corroborated by the carriers, and either or both of these facilities are denied by the carrier, then the carrier should not be released from his liability for losses and damages, in the event that we can prove by sworn statement or by such other proofs as may be necessary, that our loading and counting were in exact accordance with the description of the property contained in the bill of lading.

The carrier should be held liable for losses and damages occurring in transit, even though the bill of lading carries the discrediting clause, "Shipper's load and count," provided the shippers are able to prove by sworn statement and other necessary evidence that their load and count was correct.

We wish to enter our protest against the paragraph in question and for your consideration would suggest that same be eliminated or, failing in that, an amendment somewhat as follows substituted:

"The carrier may also, by inserting in such bill of lading the words, "Shipper's load and count," or other words of like purport, indicate that the property was loaded by the shipper and description made by him; and if such statement be true, the

carrier shall not be liable for loss caused by nonreceipt or by the misdescription of the property described in the bill of lading: *Provided*, That if the carrier verifies the shipper's count of property so loaded, or refuses so to do upon demand of shipper, he shall not insert the words, 'Shipper's load and count' in such bill of lading."

If you consider our contention in this case reasonable, would like to have your support in protecting our interests.

Yours, very truly,

AMERICAN HOMINY CO.,
Per F. L. SULLIVAN,
Traffic Manager.

The CHAIRMAN. The following letter from Mr. John Crosby, Minneapolis, Minn., will be inserted in the record:

WASHBURN-CROSBY CO.,
Minneapolis, Minn., February 26, 1912.

HON. MOSES E. CLAPP,
United States Senate, Washington, D. C.

MY DEAR SENATOR CLAPP: In connection with your Senate bill 957, relating to bills of lading, there is one point to which we ought to call your attention.

The last clause of section 4 provides that where the goods are billed "Shippers' load and count" the carrier shall not be liable for the nonreceipt or misdescription of the goods described in the bill if the statement that this was shippers' load and count is true.

The italics following the above and as a part of section 4 by proposed amendments go further when they state that the carriers shall not be liable for damages caused by the improper loading or by the nonreceipt or misdescription of the property.

When the goods are shipped "Shippers' load and count" it is an invitation to the consignee to make claim against the shipper rather than against the carrier and increases what you might call the moral risk of the shipment.

If we deliver goods to a carrier at its receiving depot we get the count of the carriers to check our own count and get a clean receipt. If, on the other hand, for reasons of convenience and economy that are persuasive both to the carrier and ourselves we load our goods into cars on tracks adjacent to our mills, we can count and check as carefully as we choose, but if the carrier does not check this count and a shortage occurs or a damage in transit, then human nature leads the carrier to say, if the case be a shortage, that our count was short, or if the case be one of damage, that we loaded the goods improperly or into a car that was improperly safeguarded.

It occurs to us that the provisions now in section 4 would effectively put a premium on the carrier's refusing to check, inspect, or count the goods after loading into cars.

We realize, of course, that all things are not possible to get at one time, but we do feel that our request is entirely feasible at this time, viz, that the emphasis to the carrier be put upon the desirability rather than upon the undesirability of his checking the goods when loaded.

This is a matter of such importance to us that we anticipate having either Mr. F. F. Henry or Mr. C. H. Cochran be present at the hearing in Washington the last of this week, coming from our plant at Buffalo, N. Y.

Very truly, yours,

WASHBURN-CROSBY CO.,
By JOHN CROSBY, *Treasurer.*

P. S.—We are sending a letter identical with this to the Hon. Frederick C. Stevens in reference to the same bill, which bears the House number 4726.

The CHAIRMAN. The telegram of Jeff D. Hardin, president of the New Orleans Board of Trade, will be inserted in the record.

NEW ORLEANS, LA., February 29, 1912.

HON. MOSES E. CLAPP,
Washington, D. C.:

We permit ourselves to request your committee give favorable consideration Stevens bill either this or some similar bill, making railroads responsible for acts of their agents should be passed by Congress. We believe commercial equity demands that transportation lines should be responsible for acts of their agents. This responsibility, fixed where it belongs, would facilitate trade and commerce. It is up to the rail lines to protect themselves against acts of their employees and not throw the burden of this responsibility upon the banking or shipping public.

JEFF D. HARDIN

The CHAIRMAN. The letters and statements from the secretary of the Ohio Shippers' Association, Columbus, Ohio, will be placed in the record:

FEBRUARY 28, 1912.

HON. MOSES E. CLAPP,
Chairman Senate Committee on Interstate Commerce,
Washington, D. C.

DEAR SIR: I beg to hand you herewith two copies of statement advising your committee of the indorsement by the Ohio Shippers' Association of Senate bills 4713 and 957 and expressing our desire that the same may receive favorable consideration on the part of the committee and reported out with recommendation for passage.

Trusting that you may see fit to call the attention to the members of the committee to the inclosed brief statement, I am,

Very respectfully, yours,

J. W. McCORD.

[In the matter of Senate bill No. 4713, a bill relating to bills of lading in commerce with foreign nations and among the several States, and Senate bill No. 957, a bill relating to bills of lading.]

GENTLEMEN: The Ohio Shippers' Association, which was organized in 1904, and whose membership consists of a large majority of the shippers in the State of Ohio, would respectfully advise you that this association most earnestly indorses the provisions of Senate bill No. 4713.

When this same measure was before the General Assembly of Ohio last year under the title: "A bill to make uniform the law of bills of lading," this association, by its representatives, appeared before the House and Senate Committees on Judiciary and cooperated with Mr. Francis B. James in support of the bill, which was reported out favorably by unanimous vote of both committees, passed both branches of the general assembly by unanimous vote, and was signed by the governor.

Hon. Samuel H. West, attorney representing the New York Central Lines before the committees, at first objected to some few features of the bill, but finally withdrew all opposition to the same as reported out and passed.

We deem it unnecessary that this association should go to the trouble and expense of sending representatives to Washington to appear in person before your committee and submit argument in support of the bill, as Mr. James, in his statement made to you on February 16 and 17, covered the ground more thoroughly than we could hope to do and expressed the views held by this association on the subject.

We respectfully ask that due and proper consideration be given by your committee to the wishes of all the shippers of the State of Ohio in connection with all other shipping interests throughout the country who are urging the enactment of this bill.

We have studied the provisions of Senate bill No. 957, which we understand your committee has under consideration in connection with Senate bill No. 4713, and desire to express the indorsement of the same by this association, as it is our understanding that the provisions of the former in no way conflict with the provisions of the latter.

Respectfully submitted.

OHIO SHIPPERS' ASSOCIATION,
By J. W. McCORD, *Secretary*.

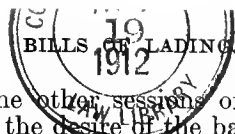
The CHAIRMAN. Are you gentlemen ready to proceed?

Mr. FAULKNER. I think we are. Mr. Thom expected to be here this morning, but he has not yet arrived, and I suggest that Mr. Bond, general counsel of the Baltimore & Ohio Co., make a statement at this time.

STATEMENT OF HUGH L. BOND, GENERAL COUNSEL BALTIMORE & OHIO RAILROAD CO.

Mr. BOND. Mr. Thom, if it please the committee, is the real accredited representative of the railroads. I am only the representative of a railroad, but am in sympathy, I think, with the majority of the railroads of this country, at any rate of the trunk lines, and I desire to discuss this matter as a practical railroad matter.

I have read the testimony that was taken before this committee at the last hearing, and of course I have been more or less familiar



with the hearings at the other sessions of Congress, and must say that I sympathize with the desire of the bankers and of the receivers of goods to have a better bill of lading; I mean by that a bill of lading that is open to fewer questions and doubts as to its validity and as to what it represents. The only point on which I differ, and I do not know that I do exactly differ, as it is only a question of ways and means rather than of principle, is in the method of reaching the result that those gentlemen want, and which I think the broader-minded railroad people want.

I do not know that I can make myself clear unless I state how business is transacted to-day. That is really what we have got to build on to start with.

I am now going to address myself not at all to the form of the bills, but to the general business, the needs of which are to be met and to what seems to me the practical way of meeting it.

To-day I think it is no exaggeration to say that not one bill out of a thousand—and I believe I could say 10,000—is made out by the agent of the railroad company. The business of this country could not move for a single day if the bills of lading were not made out by the shippers. It is not merely a question of the number of agents or the size of the platform to hold freight, but it is a question of time. There are not enough hours in the day, and there is not enough space in the streets of any large city adjoining the freight terminals of railroads to accommodate the drays and wagons. The consequence is—and all this was threshed out before the Interstate Commerce Commission when we were dealing with the uniform bill of lading, and what could be done in regard to that as requiring the making of it out by the company's agent—the result is that the ordinary course of business followed by every merchant who makes more than a very rare shipment, followed by every man who is not illiterate, and followed by every large concern, is to send the goods to the station with a bill of lading made out by the shipper, and attach to it a shipping order. That bill of lading is checked with the goods, if there is time. If there is not time—and in the large cities there has never been time between 2.30 and 4 o'clock in the afternoon—it is checked with the shipping order, and signed and given back to the drayman so he can get away. The main object in life is to get rid of that drayman, because he is blocking the streets and blocking the access of hundreds of other draymen. All the large manufacturing concerns, of course, make out their own bills of lading by preference, and when the suggestion was made at the time of the uniform bill of lading hearing that they might be curtailed, they came down in bodies to protest and explain how it was absolutely necessary that that should be, and everybody had to admit that it was necessary. I want to impress that on this committee, because it is no exaggeration to say that if Congress should pass an act that would prevent, or even seriously hamper, the making of the bills of lading by the shippers, it would inflict an expense by way of delay on the business of this country that in one day would exceed any of the losses that have been complained of as occurring from unauthorized bills of lading in the 30 years that I have been the representative of a railroad.

Now, that does not mean that we can not meet the needs and the wishes of these gentlemen who want a better bill of lading, but it does mean that we can not meet it by saying that each and every

bill of lading that is signed by any agent of a carrier must import absolute verity as to all these matters, because, as a very intelligent witness who appeared before this committee at the last hearing said—he was a banker, Mr. Wexler, from New Orleans; he is a business man of good sound sense, and knew what would be necessary to protect a railroad in issuing bills of lading that would absolutely guarantee that the goods were in its possession and absolutely make them liable—

The safeguarding by the railroad is by no means a difficult task. The railroad can audit the bills of lading of its agents in the same manner that it audits his tickets, his cash accounts, and in the same manner that the express companies and telegraph companies audit for this same agent, who usually acts in these several capacities. They can have negotiable bills of lading engraved if need be on safety paper, can prohibit the present careless use of pencil in writing and signing bills of lading, and what is more important can discharge and blacklist, which is not now done, the agent who dares to sign for articles before they are in his possession.

The business has heretofore been conducted very loosely. If these loose methods are eliminated and the same safeguards would surround the issuing of the bills of lading as now surround the sale of tickets, the danger is very small indeed.

Heretofore what happened? The railroads had quantities of bills of lading lying around their offices. When a man wanted bills of lading he could come into the railroad office and get a bunch of them and take them over to his own place, two or three hundred of them, if he saw fit.

I think it is perfectly self-evident that no railroad company with the ordinary business sense can give a right to every one of its thousands of agents to draw drafts on its treasury to an unlimited amount without any means of auditing those drafts or finding out when they are issued and to what amount. Now, that would be the result of this bill or of either of these bills as they are drawn and presented unless the railroad absolutely stopped the making of the bills of lading by shippers, because the railroad company has no record to-day whatever of the bills of lading that are signed by one of its agents. All that it has is the shipping order. All the checking is done on that; all the weighing is entered on that; and where that has been checked with the bill of lading, that is the document on which everything is based after the bill of lading has been given to the drayman.

Now, I think you gentlemen must agree with me that if the railroads are going to pursue ordinary business methods they must have some way of checking the bills of lading that are issued by an agent, which bind a railroad absolutely, whether there are any goods or not, and make it responsible to an unlimited liability. The question is how to do it without destroying the prompt movement of traffic in this country. You have heard only from the bankers and receivers of goods. I think if you had heard from the general shippers of goods and from the railroad traffic men you would be convinced, as I was convinced, and as the Interstate Commerce Commission was convinced, and as everybody, I think, has been convinced who went into it carefully, that it is practically absolutely impossible to stop the making of the bills of lading by the shippers. The business of this country could not move for a day unless they were permitted to do it.

As Mr. Wexler says, these bills of lading are just taken in hundreds. Anybody can come to any railroad office and get as many bills of lading as he chooses. They are printed on paper that is not high grade or expensive. They are, after they have been signed and

traveled about the country a little, about the most disreputable documents that a man can imagine, and to attempt to raise those into the dignity that ought to attach to a document which is carrying hundreds of thousands of dollars, is something that I think is impossible, not merely because of the bad paper, but because, as I say, there is no way of checking them; no way of auditing them.

The remedy which I have to suggest, and which I believe, after giving this matter thought for a good many years, is the only practical method, is that a provision be made for either attaching to one of these bills of lading a certificate which will be signed by some responsible agent, specially authorized for that purpose, or by exchanging that bill of lading for a bill of lading issued out of a book, as Mr. Wexler says, consecutively numbered and printed on safety paper if necessary, if the railroads think that is necessary, but issued just as a railroad passenger ticket is issued, where the traveling auditor can check it and where he can be called upon to account for what has become of every one of these documents, just as every warehouse checks its warehouse receipts, and just as every elevator checks its elevator receipts, but let that be the bill of lading with which the banks deal and on which the consignee pays the draft, if he has any doubt as to the credit of his shipper.

That is a radical departure, I admit, in railroad practice, but it is the only method in my belief and opinion that is really practicable and which gives the railroad any chance at all to protect itself, or that accomplishes anything that the bankers and these gentlemen who appear before you say they need, and which will raise the bill of lading to the dignity of a quasi negotiable commercial instrument.

Now, that means expense to the railroads. It means the assumption of a responsibility which has never been put upon them at law, and I think it only fair that in making that provision authority should be given to make a reasonable additional charge for that bill of lading, subject to regulation, of course, and the fixing of what is reasonable by the Interstate Commerce Commission.

Not only will that accomplish what these gentlemen are trying to accomplish for this bill, but it will accomplish a much more important result, and that is to do away with the forged bill of lading. Since I have been counsel for the Baltimore & Ohio Railroad, which is 30 years, we have never had any trouble from the issue of bills of lading by agents without receiving the goods, but we have had a great deal of trouble from forged bills of lading. All the largest frauds in this country have been accomplished through forged bills of lading. These gentlemen here entertain a vain hope when they think that if this form of act were passed they could relax in the slightest degree the vigilance required of them in handling bills of lading. On the contrary, the very fact that the bill of lading was given a sort of commercial value, or additional value, would make it an instrument of forgery which would be more sought to be accomplished by the dishonest.

Further than that, the attaching of penalties under the national law to the getting of a bill of lading from an agent when the goods have not been received would make it less dangerous to forge a bill of lading than it would be to persuade an agent to issue one, because the national law is a much more dangerous law to meet in most parts of the

country than the State law, as the State law is, in the absence of statute, somewhat cloudy on the forgery situation, just as was explained to you in the former hearing.

So that what I should apprehend would be the case would be not merely that the railroad will be subject to the additional dangers of dishonest men playing on the cupidity and good nature of their railroad agents, but the number of forged bills of lading will increase, and that if these bankers relax in the slightest degree their vigilance in handling bills of lading, we will get everlastingly stuck.

Now, the difficulties in telling a bill of lading, such as is issued to-day, as to whether it is forged or altered, or what has happened to it, are practically insuperable. I have had some experience with several hundred of them. In the case of one of the banks in Baltimore I tried to help the bank out. I have had experience with them in trying to straighten out the cases in which the railroad was involved, where three or four bills of lading appeared for the same goods, and it has been found in my experience absolutely impossible to tell a good bill of lading from a bad one. They are all alike. The paper is such and the signatures by the illiterate men—and these agents are people whom we have to take in the country, anybody who will act as an agent; it is not a question of choice in getting a man, but you have to take whoever you can get—are of the worst, and the forgeries, or the imitations of signatures, are practically indistinguishable.

Now, if you had a bill of lading, say, a new bill of lading, or a certificate attached to the bill of lading that is first issued—it does not matter as to the result, although I personally think it ought to be a new bill of lading—you escape not merely from the liability that they are trying to avoid by this act, where the bill of lading may have been issued without the goods, but you have a bill of lading that should be practically very difficult to forge, because the number of agents who issue the certified bill of lading can be, without serious detriment to the movement of business, limited. In the larger cities, of course, there would have to be several. In the smaller cities there need not be more than one or two along the line of the road. It would not be necessary to have one at every station, but in every important station he could serve quite a little territory around it, because the chances are there is not one order bill of lading in a week, and it would be no hardship for them to send their bills of lading up to be exchanged. In that way it would be possible to give the banks the signatures of all the important agents who issue these bills of lading. It would be possible to have these signatures at the main office of the railroad company, so that any banker could come up and compare it, if he did not happen to have the signature, and it would be possible to trace these bills of lading and be very difficult for any forger to get out a series of bills of lading, and that is what is necessary in order to carry out these large frauds by forgery. It is not one bill of lading; it is a series of them.

Now, further than that, I think that proposition, Mr. Chairman, meets a great many of the constitutional difficulties that have been raised as to this legislation. You gentlemen are familiar with the fact that the minority of the committee in the House at the last session took the position as to this legislation that it was beyond the power of Congress to regulate commerce because there was no commerce; there was not any shipper; there was not any consignee;

there were not any goods. It was simply the signing of a paper by an agent, a man who had not any right to sign, and if you gentlemen had heard Mr. Adamson argue that question I think you would be impressed with the fact that there are serious doubts about it; but there can not be any doubt that after a man has shipped his goods and has got a bill of lading it is a regulation of commerce to say that he can go to a railroad company and get in exchange for that, if it is a valid bill of lading, and I presume it is if he gets it in exchange, that he is entitled to get a certificate on that as to whether it is a valid bill of lading or not, or he can get an exchange for another bill of lading which shall not be questioned, because that is something that takes place after the shipment, and it simply throws on the railroad company the duty of finding out whether that shipment has taken place or not, and finding it out then. The right is not only to the man who has shipped, of course, but it is the duty of the railroad to find out whether he is the man who has that right or not, and there can not be any question that that is a regulation of commerce.

Now, I have not of course attempted to prepare a provision or amendment, or anything of that kind. I think this is a question which can be worked out in the way I have suggested to the satisfaction of all interests, but it could only be done probably by a conference and working over the table, exchanging suggested drafts, and working out the language so that it would be made a practicable thing and at the same time meet the needs of the bankers.

I thank you, gentlemen.

The CHAIRMAN. Waiving for the present the question of the additional trouble and expense, what is there to-day to prevent carrying out the precautionary measures which you suggest, either under the existing law or if either of these laws is enacted?

Mr. BOND. There is nothing to prevent our issuing to-day a certified bill of lading. In fact, as to cotton bills of lading in the South, many of the roads have adopted a system of attaching a certificate to prevent forgery, and that is only additional evidence that that is a practicable thing to do. That has been done, and it is being done to-day without any serious inconvenience to the public. But you have got to consider that these bankers and these business men need a little help in turning down the man who does not get this bill of lading, and if it is a thing established by law they are in much better position to do that than they would be if one or two railroads simply voluntarily did it, and I am prepared to say that I do not know that the railroads want it. I know they do not want to do it, because it is a very serious expense, and it is assuming a responsibility which they have always claimed is one that they ought not to assume.

The CHAIRMAN. I am not speaking now of the added responsibility. I am speaking now of these preventive measures which you are suggesting with reference to a more carefully prepared bill of lading, as to the paper, type, and everything with reference to the issuing of them from books, and their being numbered consecutively, with reference to their being, before they are delivered finally, countersigned by some one who covers a given area of territory, or exchange or certificate issued. In fact, in the three precautionary measures that you have suggested, is there anything that would prevent the railroad adopting them at the present time?

Mr. BOND. Perhaps no legal objection, but if this bill should become a law it would not be possible to do it, because you could not issue a bill of lading at all except one that would have all of those attributes, and you would have to stop or check in some way the issue of bills of lading as it is done to-day when they are presented by the shippers. You would have to revamp that whole practice.

The CHAIRMAN. Suppose either of these bills were in effect. What would there be then to prevent the railroads from adopting all of the precautionary measures which you have suggested?

Mr. BOND. Simply because you would stop the business of the country so that it could not move.

The CHAIRMAN. Would it stop the business of the country any more with the laws in force or enacted than it would if to-day the railroads adopted these same precautionary measures which you suggest? Those measures would entail some additional delay before the final bill of lading was issued, which was to be the ultimate proof. It would either have to be countersigned, exchanged, or the certificate issued, and under your suggestion it would entail a certain amount of delay.

Mr. BOND. But only as to those shippers who wanted that sort of bill of lading. A shipper who did not expect to go to bank, who was shipping, perhaps, and had been paid in advance for his shipments, who was shipping to his agent—his own agent—I was going to say, a majority of all the shipments would not require this sort of a bill of lading at all, but could go on just as they go on to-day.

The CHAIRMAN. But would you be safe?

Mr. BOND. Not if this act was passed, we would not. We could not let it go on as it is to-day. We would have to stop the whole course of trade in order to accommodate a part of it. That is the trouble.

The CHAIRMAN. But all this delay would be incident to the preventive measures which you suggest, whether adopted by the railroad without any express direction or whether directed in a proposed law, would it not?

Mr. BOND. No; my proposed law would simply give the shipper who needed that sort of a bill of lading the right to go and get it. Then he would subject himself to the delay. It would involve some little delay, but he would be compensated by the fact that he would get an absolutely marketable bill of lading, but we would not subject all the other shippers who did not want that kind of bill of lading to the same delay.

The CHAIRMAN. Then your idea is that a great many shippers would not want to go through that process and consequently it would not entail the same delay as might be expected if they all wanted to accept it.

Mr. BOND. Absolutely so. It would only be the man with the important shipment who would find it necessary, and that would enable the business to move just as it is now, except that when a man in his business did want to go to the bank with his bill of lading he would have to go to this other agent and exchange the bill of lading that he had made out and gotten signed and exchange that for a formal bill with the consecutive number and certified.

The CHAIRMAN. Now, one other point which strikes me as not being so easy to clear up: It is claimed now by some that the proposed law

in the form in which it is presented would be unconstitutional, because it would attempt to treat as a matter of interstate commerce something that was not commerce, upon the theory that inasmuch as no goods have been delivered to the carrier there is no act of commerce and consequently a false statement as to the bill of lading covering goods which were not in fact in transit would not be within the regulation of Congress. Would that not apply just the same if the subsequent steps taken by the agents of the company were also in fact false and fraudulent? In other words, suppose that in addition to the bill of lading it was provided that where a shipper desired he could have that bill of lading certified to or a duplicate issued by some officer covering a large area and higher in rank. If in fact that was false, would not the same objection apply to it that it was not the regulation of interstate commerce because in fact there was no commerce under that?

Mr. BOND. No; I do not think so.

The CHAIRMAN. In other words, if it applied to one case would it not apply to others?

Mr. BOND. I do not think so.

The CHAIRMAN. Personally, I do not think it applies at all.

Mr. BOND. The right would be given to a man who was a real bona fide shipper to come and get his bill of lading exchanged for one of these other bills of lading. Now the only duty you would impose on the railroad company would be the duty of finding out at that time whether in fact he was a bona fide shipper.

The CHAIRMAN. But supposing in fact that he was not, but a higher officer, equally with the subordinate agent, certifies that he is a bona fide shipper when in fact he is not; would not the same objection, if there is any force in Mr. Adamson's position, apply in the one case as strongly as in the other?

Mr. BOND. No; I do not think so.

Senator BRANDEGEE. Will you state again very briefly exactly what your proposition was about certified bills of lading?

Mr. BOND. That, instead of trying to stop the whole course of business which is conducted on bills of lading made out by the shipper, to simply send down by his drayman a shipping order checked by the receiving clerk and signed by the receiving clerk when business is pressing—every receiving clerk signs dozens of them perhaps at any station—instead of trying to control that which would have to be controlled if the railroad company is going to be absolutely liable, because there is no way of checking any of these bills; there is no way of finding out what the agent has done. Instead of doing that, to give the right to anybody who did make one of these shipments to come and get from a responsible agent of the carrier a different form of bill, in some formal form, issued from a book and with a consecutive number—just as a railroad passenger ticket would be issued, which could be checked by the traveling auditor, and that that formal bill should be made absolutely binding on the railroad and made indisputable.

Senator BRANDEGEE. Even as against forgery?

Mr. BOND. Well, it would hardly be indisputable as against forgery because it would not be a bill if it was forged. But the possibilities of forging such a bill as that would be very slight.

Senator BRANDEGEE. Why?

Mr. BOND. Because the signature of the agent would be well known; because it would be issued with the precautions which are ordinarily taken to prevent forgery, upon a finer class of paper, and all that sort of thing, and the means of forgery would not be at hand. The man who wanted to forge would have to have a large amount of printing and engraving done. As it is now, everybody has the uniform bill of lading of every railroad company, and all he has to do is to put in the marks and entries and copy them from some other bill.

Senator BRANDEGEE. But so far as forging the signature is concerned, it is just as easy to forge a well-written or a well-known signature, is it not; that is, make the imitation of it?

Mr. BOND. If you have the paper, and all that, to go on, it is. That is true.

Senator BRANDEGEE. I did not understand what you meant by the expression you used that it was the custom in these forgery cases for the forger to issue a series of forgeries.

Mr. BOND. I mean the large losses have been through a series of forged bills. It has almost always been the case where a man is involved in speculation that he started with valid bills, and then he has got out his valid bills and has put in forged bills, and he carries it on through a course of a long series of forgeries.

Senator BRANDEGEE. You do not mean a series of different railway officials' names?

Mr. BOND. Oh, yes.

Senator BRANDEGEE. A series of the same railroad officials' names, or a series in different parts of the country or purporting to come from the same part of the country.

Mr. BOND. Generally from the same part of the country, because that is where he would have to get them from, where he ordinarily deals. Of course, in many cases, the man would issue three or four forged bills of lading at once from the same shipper. He would have a genuine bill of lading. I recollect one case, in Kansas I think it was, where the man forged three duplicates. He forged three bills and he had the genuine and three forgeries, and of course he got the money four times. But ordinarily the losses are due to the man substituting in bank. He is still going on doing business otherwise. He could not dispose of the forgeries, but he substitutes in the bank for a good bill a forged bill, and as he gets more and more involved the forgeries increase and the good bills decrease. That has been the history of it, but it required a series of forgeries to have accomplished his purpose.

Senator BRANDEGEE. Did I understand you correctly, to say that in your 30 years' experience on the Baltimore & Ohio Railroad you never had known a single instance where the bill of lading had been issued and where no goods had been deposited against the bill of lading? I do not know whether I heard you correctly. That is the reason I ask the question.

Mr. BOND. I did not say there was no instance. I think we did have, years ago, a man who got out a bill of lading for some cattle that he did not get on board, but that was years ago.

Senator BRANDEGEE. Was that a case of fraud—intentional fraud—or accident?

Mr. BOND. No; I think not. It is very hard to say how it happened.

Senator BRANDEGEE. Is that the only case that you can recall?

Mr. BOND. That is the only case that I can recall now.

Senator BRANDEGEE. Have you any knowledge about the extent through the country at large in which bills of lading have been issued when no goods were deposited or exchanged?

Mr. BOND. No; I have no general knowledge, but from my general information from other counsel it has not been in trunk-line territory at all a troublesome matter until quite recently. In some of the States where this form of act has been passed, that kind of fraud has seemed to be on the increase.

Senator BRANDEGEE. Which form of act?

Mr. BOND. The form of getting out—

Senator BRANDEGEE. Similar to these proposed bills, or these proposed laws?

Mr. BOND. The law in New York is practically the same as this, yes. That is the only large case that I know of.

Senator BRANDEGEE. Has this question been presented to previous Congresses or previous committees? I am a new man on this committee and I do not know much about it.

Mr. BOND. This general question?

Senator BRANDEGEE. Yes.

Mr. BOND. Yes; it has been discussed I think for five years.

Senator BRANDEGEE. Are the positions of the parties to the controversy about the same now as they were originally?

Mr. BOND. No; I do not think they are.

Senator BRANDEGEE. In what respect have they changed?

Mr. BOND. I think the railroads with which I am more particularly associated feel that we ought to do everything we reasonably can to elevate the bill of lading.

Senator BRANDEGEE. You mean originally, you did not want to do anything?

Mr. BOND. Yes.

Senator BRANDEGEE. And now you think something ought to be done?

Mr. BOND. Well, I think everything ought to be done that we can by any safe way do. I think that is the feeling largely because not all issues of unauthorized bills of lading by agents would cause—that is, the recent forgeries—the large losses and discredit which has been cast upon the American bills of lading abroad.

Senator BRANDEGEE. During these five years have you made any attempt at conferences with the shippers or consignees or the bankers or boards of trade who are agitating in behalf of this matter to arrive at some agreement with them about legislation in this respect?

Mr. BOND. Yes; the railroad representatives and bank representatives have been in conference every session, I think, and they have agreed upon quite a large number of provisions. But my trouble is that if you attach this character, this application, to every bill of lading that is issued, you would absolutely block the business of the country.

Senator BRANDEGEE. Has it ever been put into writing in any way—the number of things upon which you have been able to agree?

Mr. BOND. Yes; they are offered as amendments in the present proceedings.

Senator BRANDEGEE. And you are willing that the shippers should take a little more time and trouble to get a good certified bill of lading,

and have that made absolutely binding on the railroad so it can not be questioned for anything except forgery.

Mr. BOND. Speaking for the Baltimore & Ohio Railroad, yes. I think that is the only way I can see we can really reach a practical solution. That business can go along as it is, and at the same time give the banks what they need.

Senator BRANDEGEE. I do not want, of course, to make any suggestions to you as to how to manage your business, and you need not answer this question if you do not want to—but is there any attempt now going on in the way of negotiations between gentlemen interested in this thing to see if they can not arrive at some common ground?

Mr. BOND. I think they are discussing it every day—certainly every time this committee meets.

Senator FOSTER. Have any States any laws similar to the one under discussion?

Mr. BOND. Yes; I think substantially the Pomerene bill has passed in a number of the States——

Mr. JAMES. In nine.

Senator FOSTER. How does that law operate in those States?

Mr. BOND. Well, they are mostly States where there is pretty dense population, dense shipments—and the agents are high-class men, and with the exception of the experience of the Delaware & Hudson Co., I do not think there has been any very serious losses.

Senator FOSTER. Have there been any serious interference with business in your observation?

Mr. BOND. The railroads have not attempted to protect themselves, but they are operating in a very different country. The conditions in the places where such railroads are operating are not applicable all over the United States.

Senator FOSTER. What States have laws similar to this bill?

Mr. BOND. New York and Massachusetts, I know.

Mr. JAMES. I think I can give you a little light upon that subject, if you would like to have me do so. The States of Connecticut, Illinois, Iowa, Massachusetts, Maryland, Michigan, New York, Ohio, and Pennsylvania—nine.

Senator FOSTER. Does the enforcement of that law in those States interfere seriously with the commerce and the rapid and adequate transportation of freight?

Mr. BOND. Well, thus far the railroads have run the risk and let the thing go right along as it is. I do not believe they will be able to do that permanently.

Senator FOSTER. The railroads comply with the law in those States, do they? They have not contested it, have they?

Mr. BOND. As far as I know, with the exception of the Delaware & Hudson, there have not been any very serious cases. but I do not think that is a fair criterion of what will happen if Congress should pass a law of this kind. I think that will give a standing to the bill of lading and make it of value in getting money that will lead to crooked men seeking that method of defrauding. The wonder is that there have not been more frauds. It is, as compared with the holding up of taxicabs——

Senator BRANDEGEE. A safe industry.

Mr. BOND. A safe industry, and much more profitable, and the wonder is they have not had intelligence enough to take hold of it.

Senator FOSTER. That is all I care to ask.

Senator TOWNSEND. Perhaps they have not thought of these opportunities to commit fraud that you are suggesting, and that is the reason they have not been committed. After they read these hearings they may take advantage of them.

Mr. BOND. I am frank to confess that it has been a surprise to me all through my professional career that they have not done more of it, because I see how easy it is.

Senator TOWNSEND. What proportion of the bills of lading that are issued are order bills of lading?

Mr. BOND. That I could not say. I tried to find our data which was worked up with the Interstate Commerce Commission, but I was unable to find it. I think it was stated in the last hearing. Senator Faulkner says that in the last communications from the railroads he heard from two of them which put the order bills of lading at a very low percentage, and that a small percentage of them were used in the banks. The number of bills of lading issued are something perfectly enormous, Senator.

Senator TOWNSEND. But the order bills of lading are less than 5 per cent?

Mr. BOND. Yes, sir; according to these figures, about 2 per cent.

Senator TOWNSEND. Well, if restrictions were placed upon the issuance of such bills of lading, would it materially interfere with traffic?

Mr. BOND. As the law is now, we have to give the man any bill of lading he wants. That is, when the shipper makes out his bill of lading he decides whether it is order or not. It is all on the same form except the words "order of" are written in, and it would not of course be nearly as serious if the law was confined to order bills of lading, but I do not really see where the man who is going to make a straight shipment should not have the right to go and get a certified bill just as well as the other man.

Senator TOWNSEND. Are they demanding it?

Mr. BOND. No; I do not think they are, except possibly our egg shipper from New York. He was a straight consignee, I think, in some cases.

Senator TOWNSEND. Then, really, the demand that is being made is on the part of those who desire order bills of lading?

Mr. BOND. Yes, sir; those who take the bill of lading intermediate and lend money on it.

Senator TOWNSEND. Did I understand you to say that it would be of serious inconvenience to the railroads and interfere with traffic if the order bill of lading was issued according to the provisions laid down in either of these bills?

Mr. BOND. Well, I could hardly say. Of course it would not be very serious if the order bill of lading is only 5 per cent of the bills.

Mr. THOM. May I interrupt you just a moment to say that there is an article in yesterday's Wall Street Journal that has been brought to my attention which states that the banks handle about 20 per cent of all bills of lading which are issued.

Senator TOWNSEND. Of the order bills of lading?

Mr. THOM. No, sir; 20 per cent of all. There is about \$25,000,-000,000 of business handled through bills of lading, and of that \$5,000,000,000 is handled by the banks.

Mr. BOND. But that is in dollars and not in number of bills.

Senator TOWNSEND. That is what I was going to ask you.

Mr. BOND. All those figures are in dollars and not in number of bills. It is the important business that does go through the banks. It is the business that has to be carried and followed, where you have money to carry it on.

Senator TOWNSEND. I will ask you this question. Do the banks deal in anything but the order bill?

Mr. BOND. Not to my knowledge.

Senator TOWNSEND. So that whatever they are, the banks are only interested in that class of bills of lading?

Mr. BOND. So I understand.

Senator TOWNSEND. Then if that number is small—and I think you must admit that it would be about 5 per cent, or not more than 5 per cent, of the total number I am talking about—I suppose it takes as much time to issue a straight bill of lading as an order bill, or a bill for a crate of eggs, as it does for a carload of cotton?

Mr. BOND. Well, practically the railroad itself, through its agents, issues no bills of lading except those exchanged for elevator certificates, or the receipts of terminal railroads. All the other bills of lading that are used in business are made out by the shippers themselves.

Senator TOWNSEND. Has that always been the custom?

Mr. BOND. It has been a growing custom, as time got to be more important. It is the saving of time that leads them to do it.

Senator TOWNSEND. Does that custom prevail as much in places where their traffic is not congested as it does in other places?

Mr. BOND. In the cities, yes; of course, in the country districts, perhaps, no. The man there would not probably have a bill of lading forwarded. He would have to go to the station to get it and there he might ask the agent to do it, although even there he generally saves a great deal of time by doing it himself.

Senator TOWNSEND. Did you ever check up these at all to find out whether they had been properly made out?

Mr. BOND. There is no way of checking.

Senator TOWNSEND. No way at all. Now, there are three parties to this bill-of-lading controversy, are there not—the shipper, the banker, and the railroads; that is, three parties interested, I mean?

Mr. BOND. I do not think the shipper has taken very much interest in it except in a general way. He would like to have something that the banks will take. That is his interest.

Senator TOWNSEND. My experience on this committee has been, and the committee in the House also, that there have been three very active parties in this controversy, and once or twice, as I recall it, the matter has been dropped from the consideration of the committee with the understanding that those three parties were going to get together and determine upon something that they could all agree upon and be satisfied with. But you do not recall that the shippers have been very active in this matter?

Mr. BOND. I can not state as to that, Senator, because I have not been very active myself—that is the truth of it—in these conferences. I have only a general knowledge of them.

Senator TOWNSEND. And you can not speak from the shipper's standpoint on that proposition?

MR. BOND. No, but I know the shipper wants something that the banks will take. That is one of his interests, and another interest is not to have a law that will seriously impede and delay him in his shipments.

SENATOR TOWNSEND. I think that is all. There are some other questions that I would like to ask Mr. Bond after the others have testified.

THE CHAIRMAN. Mr. Bond will be here.

Mr. Bond was thereupon temporarily excused.

STATEMENT OF ALFRED P. THOM, COUNSEL FOR THE SOUTHERN RAILWAY CO., WASHINGTON, D. C.

MR. THOM. Mr. Chairman and gentlemen, I shall not undertake to discuss the special features of the bills which you have under consideration. I understand that at its last meeting the committee was more especially interested in the general features that ought to be incorporated in such legislation than in the provisions of any particular bill, and before approaching the general subject under consideration, I would like an opportunity to explain to the committee what, according to our experience and observation, the difficulties in respect to bills of lading are.

I represent especially here the Southern Railway Co., although I likewise represent the majority sentiment of about 100,000 miles of railroad, which in turn is represented by an advisory committee, of which I am a member. The Southern Railway Co. operates lines about 7,000 miles in length, running from the Potomac River to the Gulf, and from the Atlantic to the Mississippi River. According to my experience, there has never in my memory been any difficulty growing out of a bill of lading issued by an agent of the company for which no goods had been received. We have had most unfortunate experience in respect to the forgery of bills of lading. It was in connection with our road and the Louisville and Nashville Railroad especially that the great Knight-Yancey frauds were committed within the last two years.

I would like to explain to the committee the system that was adopted in that case, so that they can understand the dangers which have been—according to our experience in our territory—especially confronting the business in this country.

Knight-Yancey & Co. were large operators in cotton at several points in the South, and especially at Decatur, Ala. Decatur is not a large place, but it is a large shipping place for cotton. Knight-Yancey & Co. got into the habit of using this method in dealing with bills of lading: They would forge bills of lading for cotton of certain quantities and of certain marks. They would attach these forged bills of lading to their drafts and put them in the bank and let them go forward, the drafts being for the most part drawn on Liverpool, but some were drawn on New York. Then within 30 days, or some other time, they would deliver to the carrier the quantity of cotton called for by the bill of lading (the forged bill of lading), with the marks on it that were called for by the forged bill of lading, and would take out from the carrier a bona fide bill of lading for the cotton so delivered. Then they would destroy the bona fide bill of

lading and let the cotton go on and be delivered on the fraudulent bill of lading. That was in the early stages of their necessities, but the committee will understand that shortly a system of fraudulent transactions such as that would grow, and in a little while, as their necessities increased, they would not only leave outstanding the fraudulent bill of lading, but they would negotiate the bona fide bill of lading.

Senator TOWNSEND. A duplicate?

Mr. THOM. There were no duplicates. One had been issued a month before the other. But they would have one delivery of cotton, and have outstanding against that a forged bill of lading issued a month ago, for instance, and a bona fide bill of lading issued to-day, when the cotton was delivered. So that when they could not carry on this business of getting the accommodation by having the credit a month ahead of the time they were entitled to, they would get the credit on the fraudulent bill of lading at the time it was forged, and then would likewise negotiate the bona fide bill of lading, which before they were in the habit of keeping or destroying. So that they would have outstanding against 100 bales of cotton, for example, a forged bill of lading issued some time in the past, and a bona fide bill of lading issued when the cotton was delivered to the carrier.

Well, of course, the time came when that system must be exposed, and it was exposed, and the collapse came.

Now, out of that transaction grew losses, running up to about \$6,000,000, as I remember the figures. The Liverpool cotton dealers, the New York cotton dealers, and a committee of the American Banking Association had a conference with the authorized railroads—the executive officers and the chief legal advisers of the principal railroads in the South—with respect to this situation. I was present and participated in those meetings. It was recognized by the bankers that the situation with which they were confronted in dealing with those bills of lading was not the danger of a bill of lading issued by an agent of the railroad for which no goods were received, but was the danger of forgeries growing out of the transaction from which they were themselves suffering, and by which they sustained losses amounting to some \$6,000,000, and an effort was made by joint action between the railroads and these bankers and these representatives of cotton buyers to devise a means by which that great avenue of loss might be closed, and a means was devised and is now in operation.

That means was this: The railroads took this position: That the buyers of cotton, the banks, the dealers in their bills of lading, had a right under existing law to every safeguard that could be reasonably devised for the purpose of indicating the genuineness of the paper which purported to bear their names. But that under existing conditions of the law there was no justice in the suggestion that a larger responsibility should be placed upon the railroads with respect to bills of lading it actually issued than existed to-day.

Then those lines of railroad said to the bankers and to those other gentlemen, "We are willing to cooperate with you to the fullest extent for the purpose of devising ways and means to protect the genuineness of, and bona fides of, the transactions which are said to bear our names." With those lines marking the limits of the negotiations which were to occur, the matter was taken up and, as I say, a method was devised. The method was this: That the railroad should issue

to its agents at all important designated points a book as carefully prepared and as carefully audited as the series of passenger tickets; that there should be in that book a stub—what we call a signature-validation certificate—and a duplicate of the signature-validation certificate; that that certificate should be attached—the original of that validation-signature certificate should be attached—to every order-notify bill of lading for foreign account; that it should be printed on prepared paper; that it should be attached in such a way that a stamp should go through it, and the bill of lading to which it was attached, and that it should be signed by some person other than the person of the railroad company signing the bill of lading; that it should certify that the signature of the agent to the bill of lading was the true and bona fide signature of that agent; that the duplicate of that signature-validation certificate should be at once sent by the agent to the principal accounting offices of the company, and should be preserved by him and carefully checked against the bills of lading; that if any one of those certificates were destroyed or defaced or in any way rendered incapable of use, it should be sent back to the auditing department that issued it with as scrupulous care as if it were a canceled passenger ticket.

In addition to that I will say that the bankers themselves, or some agency other than the railroad, undertook to establish, in the city of New York, what is known as a central bureau, to which bureau the railroads undertook to send promptly a copy of each bill of lading that had been issued by them. So that a bank interested, when a draft was presented with a bill of lading attached, could send to this central bureau and see whether there was anything at the bureau to indicate that such a bill of lading had been issued. Now that is in operation to-day in the whole southeastern territory, east of the Mississippi River and south of the Potomac and Ohio Rivers, in respect to cotton. I do not mean to say that it is entirely satisfactory to all of the bankers. The thing that is not satisfactory to the bankers is this central bureau in New York. The bankers in other parts of the country deemed that that has a tendency to concentrate the business to-day in New York away from other ports of the country, and, as a consequence, there have been large controversies between the bankers in respect to the central bureau in New York. The chances are, however, that they will be reconciled between themselves.

Now, that is the difficulty that we have had to deal with. That is the avenue through which harm comes to the business world in respect to bills of lading in our territories. There is no harm, within my experience in charge of affairs of this railroad company, in any single case which has come from a bill of lading which has been issued by an agent without the corresponding delivery to the carrier of the goods purporting to be issued.

I do not wish to be understood, Mr. Chairman and gentlemen, that there is no such difficulty in any part of this country. I have heard statements here before this committee which indicate that in some sections of the country there does exist that difficulty, but I mean to say that as far as our experience goes the difficulties that the shipping public and the banking public have are not with the bills of lading which have been issued by the company for which no goods have been received, but from forgeries which have been committed and which this legislation is not intended to meet.

Of course no legislation could meet the difficulties growing out of a forgery. No legislation could undertake to make the railroad company liable on a bill of lading that it did not issue and to which its name was forged. That is a matter that can only be managed through some such plan as is now in operation in the territory to which I have alluded.

I come now, therefore, to address myself to what can be done by this legislation and what is sought to be done, and in discussing that question I want to call the particular attention of this committee to the present law on the subject, not that every member of this committee does not know it, but in my experience it always helps lawyers to find out the exact statement of the law which they must have in view in any legislation which they propose of a remedial character.

The law on this subject in respect to interstate commerce is now set out in the case of *Friedlander v. The Texas Pacific Railroad Co.* in 130 United States, 416. That case was this: It arose in Texas. It involved 200 bales of cotton. It was where a railroad company's agent had issued its bill of lading for 200 bales of cotton in fraudulent collusion with the shipper. There was no cotton delivered to the railroad company, but for the purpose of fraud and gain a conspiracy was entered into between the railroad company's agent and the shipper by which the railroad's credit should be pledged for 200 bales of cotton which the railroad had never received. That bill of lading was attached to a draft and the draft was taken up by a bona fide purchaser who had no knowledge of this fraud. The suit was by this bona fide purchaser. The opinion of the court was delivered by Chief Justice Fuller, and was the unanimous opinion of the court.

Senator BRANDEGEE. In what year was that?

Mr. THOM. That was in 1888. I read from page 423. Mr. Justice Fuller stated the facts of the case as follows:

The agreed statement of facts sets forth "that, in point of fact, said bill of lading of November 6, 1883, was executed by said E. D. Easton, fraudulently and by collusion with said Lahnstein and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton," and it is further said that Easton and Lahnstein had fraudulently combined in another case, whereby Easton signed and delivered to Lahnstein a similar bill of lading for cotton "which had not been received, and which the said Easton had no expectation of receiving," and also "that, except that the cotton was not received nor expected to be received by said agent when said bill of lading was by him executed as aforesaid, the transaction was, from first to last, customary." In view of this language, the words "for transportation, such as is represented in said bill of lading" can not be held to operate as a limitation. The inference to be drawn from the statement is that no cotton whatever was delivered for transportation to the agent at Sherman station. The question arises, then, whether the agent of a railroad company at one of its stations can bind the company by the execution of a bill of lading for goods not actually placed in his possession, and its delivery to a person fraudulently pretending in collusion with such agent that he had shipped such goods, in favor of a party without notice, with whom, in furtherance of a fraud, the pretended shipper negotiates a draft, with a false bill of lading attached. Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential, to enable them to perform their particular functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer a different purpose and perform different functions. They are regarded as so much cotton, grain, iron, or other articles of merchandise in that they are symbols of ownership of the goods they cover.

And as no sale of goods lost or stolen, thought to be a bona fide purchase for value, can divest the ownership of the person who lost them or from whom they were stolen,

so the sale of the symbol or mere representative of the goods can have no such effect, although it sometimes happens that the true owner, by negligence, has so put it into the power of another to occupy his position ostensibly, and to estop him from asserting his right as a purchaser, who has been misled to his hurt by reason of such negligence. (*Shaw v. Railroad Co.*, 101 U. S., 557, 563; *Pollard v. Vinton*, 105 U. S., 7, 8; *Gurney v. Behrend*, 3 El. & Bl., 622, 633, 634.) It is true while not negotiable as commercial paper is, bills of lading are commonly used as securities and advances; but it is only as evidence of ownership, special or general, of the property mentioned in them, and of the right to receive such property at the place of delivery.

Such being the character of a bill of lading, can a recovery be had against a common carrier for goods never actually in its possession for transportation, because one of its agents, having authority to sign bills of lading, by collusion with another person, issues a document in the absence of any goods at all?

It has been frequently held by this court that the master of a vessel has no authority to sign a bill of lading for goods not actually put on board the vessel, and, if he does so, his act does not bind the owner of the ship even in favor of an innocent purchaser. (*The Freeman v. Buckingham*, 18 How., 182, 191; *The Lady Franklin*, 8 Wall., 325; *Pollard v. Vinton*, 105 U. S., 7.) And this agrees with the rule laid down by the English courts. (*Lickbarrow v. Mason*, 2 T. R., 77; *Grant v. Norway*, 10 C. B., 665; *Cox v. Bruce*, 18 Q. B. D., 147.) "The receipt of the goods," said Mr. Justice Miller, in *Pollard v. Vinton*, supra, "lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver." "And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea," as was said by Mr. Justice Matthews in *Iron Mountain Railway v. Knight* (122 U. S., 79, 87), he adding also: "If Potter (the agent) had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of the schooner *Freeman v. Buckingham* (18 How., 182) and *Pollard v. Vinton* (105 U. S., 7)."

It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the law should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Co. The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only, and held to rigid responsibility as such. Easton, disregarding the object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of Lahnstein, became participes criminis with the latter in the commission of the fraud upon Friedlander & Co., and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business.

And held that the company was not liable.

Now, that is the law under which the carriers of this country are carrying on their business of transportation to-day. That is the limit of the liability imposed upon them by law, in respect to the commerce which they carry.

Senator CLARKE. Do you not think that decision was wrong, and do you not think it has caused the commerce of this country more injury than the value of the cotton crop? Should not the railroad company evolve the things which would not make it responsible? If the court had said: "You are responsible for these things. You employed that agent, and you put him in office and then you gave him a rubber stamp and printed paper and enabled him to put out a document which Friedlander could not have detected from a genuine one, no matter what diligence he displayed." By making that a rule of action the railroad companies would evolve something of help to the country instead of making it the business of every crooked fellow they got, knowing that the railroad company, which was near

at hand, would not be liable for it? Do you not think that was an erroneous decision?

Mr. THOM. I do not, Senator, and I am going to give you my reasons, if you will be patient and hear me. This is a necessary proposition under the conditions which do not recognize the risk involved and do not pay for it. Take the company that I represent. As I have said, we represent a territory of about 7,000 miles. We are located in all kinds of communities, and we are obliged to get what agents we can for the money we can pay them. We have 1,500 or 2,000 of those agents. They are men of varying intelligence, and of varying character. Some are good men, utterly beyond the power of corruption.

Senator CLARKE. You think the moral hazard involved in dishonesty or inefficiency of an agent should be a tax on the shippers and not on the railroad?

Mr. THOM. I am coming to that if you will let me. Some are weak men who can be corrupted.

Now, what is it that these men have in their hands? Is it a trifling responsibility? Is it a small matter that is suggested to make the railroad company responsible not only as a carrier, but as a banker? Each one of these agents would have in his power, if the railroad was responsible for goods which it did not receive, to pledge the whole credit of the railroad in collusion with a dishonest shipper in a dishonest transaction. Now, that is a proposition so startling that it challenges the calm consideration of every statesman who is called upon by his duties to deal with it. The railroad credit of this country is not a matter for them alone. It is not a matter in which in its larger sense they are especially interested. Under existing systems the whole system of transportation is involved, and the public is more largely interested in it than even the railroads are. If there is one thing that must be preserved, whatever else fails in this country, it is that some efficient and adequate means shall be maintained at all times by which the producing industry of this country can have its products carried to the markets of the world, and in order to preserve in their integrity and in their full usefulness these transportation systems a fair and honest and just method must be devised by which they shall not be subjected to ruinous risks which at any moment may bring them down and prevent them from expanding as commerce needs them to expand and of performing the duties which commerce demands that they shall perform.

Now, whether that decision be right or wrong, Senator, we must all admit this, that on that measure of liability the rates of the railroad company have been fixed as they exist to-day. The services of the railroad companies to-day are performed with that limitation on them. The rates which are paid to them are paid for that service with that limitation on them, and that is entirely without reference to whether the decision be right or wrong. But I am told that the requirements of business have advanced; that the business of this country can no longer be done according to the methods now in vogue on the principle announced in this decision. I can see strong reason for that proposition. I can see that telegraphs, telephones, and quick transportation facilities have made time of immense value in financial transactions. I can see that it is of the utmost importance to a shipper to be able to utilize his shipment from the moment that it is

shipped, and not have to wait for his financial returns to go into other transactions until that shipment can arrive at its destination and he can receive the proceeds of it by the slow method in vogue 50 years ago. But that is a necessity, Mr. Chairman, when we come to analyze the situation that has been created by the banks and by the business men. That is an evolution growing out of improved methods, for which they have credit and for which they have responsibility. It is not a thing for the enlightened managers of railroads to stand in the way of. It is a condition which enlightened managers of railroads ought to appreciate and to cooperate with as far as is just and reasonable. It is not for the railroads, if they are managed in an enlightened and a broad way, to try to put an obstacle in the way of improved methods in business, but it should welcome them and should cooperate with them to the full extent that is just and right.

Therefore it is, Mr. Chairman, that I do not come here to antagonize the proposition that improved methods in respect to bills of lading should be adopted. I do not believe these bankers have come here and simply without reason attempted to put a hardship on the railroads. I think they believe that the necessities of their business require that there should be these improved facilities, and I for one do not propose to stand in their way, but I propose to ask at the hands of this committee and of Congress a just recognition of what ought to be done when that change is made. Is there a substantially different service as to these railroad companies under the proposition of these bills over what they now perform? That is the first question which you gentlemen will have to determine. Are we asking of these railroad companies something of the same service that they perform now, or are they asking a different and enlarged service? Let me refer to what I said a moment ago in connection with that question.

The present proposition is that a railroad company is a carrier alone; that neither his duties nor obligations begin until the goods are received. He is just a simple carrier of goods after he receives them, and it is for that service of carriage alone that he is paid in the rates that are fixed. Now it is proposed not only that he shall perform the duties of a carrier, but that he shall go beyond that and become the guarantor of a bankable piece of paper. He was not that before. Right or wrong, these gentlemen come here and ask at your hands that he shall be made that now. What they ask involves at the hands of railroads, with 1,500 or 2,000 employees of all grades in all kinds of communities, the right to pledge the whole responsibility of the railroad company by his simple signature. Suppose in this Knight, Yancey & Co. case that such a law as is proposed had been in existence, and suppose that instead of the honest agent that we happen to have had at Decatur, Ala., there had been a man open to the corrupting influences of the big shipper who wished to use the railroad credit for the purpose of kiting transactions for his own benefit and the benefit of the agent. Instead of a forgery of \$6,000,000 at that point there might have been bills of lading issued by the railroad agent for \$6,000,000 without any cotton being received. Would that indicate that there is no additional service expected of the railroads under this proposition from that which exists now? Is there a banker who would assume that large responsibility, placing his whole credit in the hands of men who must be more or less

irresponsible; who must be, on account of the way they are scattered through the country, more or less beyond the power of successful and adequate supervision, putting the whole credit of his bank in the hands of such an irresponsible party without charging for it? Is it not a principle of finance, and a just and right principle of finance, that the credit—that the risk that a man takes must be paid for?

Now, what I propose to ask at the hands of this committee of Congress is that they will recognize this proposition, which I submit to to them is just, that they shall provide in any legislation which is favored that there should be two bills of lading, one with the existing responsibilities and the existing service, and the other a guaranty bill of lading; that there shall be the responsibility of the railroad behind it, and that the act shall provide that for this additional service the railroad company shall be allowed to charge a reasonable compensation, to be fixed in the first instance by itself but to be subject to the control of the Interstate Commerce Commission just as the other roads are subject to such control. The bankers, I think, have a right to better protection in respect to bills of lading; but there can be no just difference in respect to the proposition that what is asked in that regard is a large additional service involving a large additional responsibility. All that we ask is that if this committee shall think that a different piece of paper, with different responsibilities, with increased obligations and therefore increased service, should be demanded of these carriers that there should be a reasonable difference made in the charges for the two services. I do not ask that the railroad company shall be allowed to fix that difference arbitrarily. I know that the time has gone by when that is the policy of this country, and I believe it has happily gone by. So that I think that that charge of a railroad company should be subject to the supervising authority of the Interstate Commerce Commission just as any other of its charges are.

So, for the railroads that I represent here, we ask that there shall be a recognition in the terms of this act of the difference in the service between that which is performed under the existing conditions of liability and that which will be performed under the increased condition of liability; that that difference shall be made reasonable, subject to the control of the Interstate Commerce Commission.

There is one other thing that I would suggest to the committee. I think that there ought to be a penalty imposed upon the railroad agent and upon the shipper who dishonestly issues such a bill of lading. I know that will have to be carefully guarded so as to meet with the requirements of commerce. For example, a great many of the trunk lines of this country receive their shipments not on their own lines, but on some belt lines, or on some terminal line. It would be a serious inconvenience to commerce if no bill of lading could be issued until the goods reached the trunk line. There should be a permission by which the trunk line should regard the belt line, or the terminal line, or the elevator, or the warehouse, as its agent for receiving these goods, and that it should not be a crime to issue a bill of lading when the goods have been delivered either to the elevator, or to the warehouse, or to the belt line, or to the terminal line, and the agent of the trunk line issues its bill of lading upon the receipt of that first organization.

A great deal of the opposition which has grown out of this idea of making the agent and the shipper criminally responsible has been caused by such conditions as I have stated, but it seems to me that those conditions can be covered by defining on the face of the act what may be legitimately considered a receipt by the company of the goods.

Now, you gentlemen perhaps are not more fully aware than I would be, except for some special experience that I have had in respect to it, of the pressure that there comes upon the railroad from a shipper to get his bill of lading at once. We had, for example, in the first stages of this arrangement that I have referred to, in the South, a provision that we should not issue bills of lading on warehouse receipts. We adhered to that during the whole of the cotton season previous to this, because it was not a system that was accommodating the special methods of business adopted at Memphis, Tenn. We lost 30,000 bales of cotton that year, which went to our competitors, some or whom did not feel bound by it and did not adhere to it, because they did issue bills of lading on warehouse receipts and we did not. The shipper felt that the minute he got his cotton into the first agency that led to transportation that he must be able to get the money for that in his bank. He could do that if the railroads would recognize the warehouse receipts and issue their bills of lading upon them. He could not do that in the case of the railroads that would not recognize the warehouse receipts, and would not issue the bills of lading until the cotton actually reached that railroad.

Now, I believe, from the experience that we had in that connection, that that is a necessity of business. I believe that we have got to permit the railroad companies to recognize the receipt of the warehouse and compress companies and elevators and belt lines and terminal lines as a receipt by them. We are able to bond the compressors, we are able to bond the warehouses, and I believe that is a necessity of modern business, and that that will indicate the care with which this committee in dealing with any subject of this sort has to go into the needs, the reasonable and intelligent needs, of modern business, and be sure not to incorporate anything that will be obstructive instead of helpful.

Now, with these suggestions, gentlemen, first, that there should be a recognition of the difference in service; that that difference in service is a substantial and valuable thing; that for it there ought to be, in justice, a reasonable compensation for the great additional risk involved; and, second, that there ought to be penalties on the agent, on the shipper, and if need be on the dishonest banker who negotiates the bill of lading knowing it to be a forgery, but anything and everything, gentlemen, that will protect the integrity of the business of this country.

Those are the suggestions that I wish to submit to the committee.

Senator BRANDEGEE. If a cashier of a bank certifies or over-certifies a draft or a check, is the bank liable?

Mr. THOM. If the cashier of the bank does it, yes.

Senator BRANDEGEE. The bank is liable?

Mr. THOM. Yes.

Senator BRANDEGEE. If the agent of the railroad company certifies that the railroad company has received the goods, why should not the railroad company be liable?

Mr. THOM. Because there is a vast difference between the cashier of a bank and the railroad company's agent at distant points. While the cashier of a bank is liable, it means where the cashier issues such a certificate as a negotiable certificate he is liable. The bank is not liable if the teller at the window enters in the bank book a deposit which is not made. The bank is not liable. Now, the cashier is a man chosen because of his intelligence and because of his integrity and because of his responsibility, and he is one man. He is right under the direction and control of the board of directors and of the president all the time. He is a man chosen because of his power to do those things, and because of his character and ability, is selected as a safeguard against it. Now, that is a very different situation in practice from where a railroad company has from 1,500 to 2,000 agents scattered all over the country at low rates of pay—the best that can be given being low. They are men of different character, men in respect of whom there can not be supervision, whose transactions are not subject to every-day inspection, but where days must elapse before the manager of a railroad company can come in contact with what they are doing and become conversant with it.

Senator BRANDEGEE. I appreciate thoroughly the difference in the physical situation, and in the circumstances that surround the two kinds of business, but where is the difference in principle as to the principal being bound by the unauthorized act of an agent or an agent acting without the scope of his power?

Mr. THOM. The difference in principle has been created by the difference in condition, and whatever I will say in addition, in reply to that, whatever may be the soundness of the distinction that you suggest, nevertheless the just distinction exists, and the present rate of pay is on the theory that he is not responsible. Now, you propose to make the railroad company responsible—or at least I mean this bill does—make the railroad company responsible. I am not objecting to that. I am not objecting to that principle that you have just referred to about the bank cashier being applied to transactions with the railroad, provided that the difference in condition is recognized, and the difference in compensation is allowed to compensate for the additional risk.

Senator BRANDEGEE. I appreciate your position thoroughly. Has this suit in the case in 130 United States ever been modified at all?

Mr. THOM. No, sir.

Senator BRANDEGEE. It has never been confirmed?

Mr. THOM. I think it has been confirmed.

Senator CLARKE. Yes; that is accepted.

Senator FAULKNER. There are eight decisions confirming it.

Senator BRANDEGEE. What is the situation in one of these nine States that have adopted bills-of-lading laws similar to those proposed here (which, of course, have no force outside the limits of the State which has adopted them), where the railroad runs from the State which has adopted the law into another State which has adopted no law, and where I suppose the principle laid down in this suit prevails—what is the situation there as to the railroad's liability?

Mr. THOM. I do not think that the question has ever been presented to the Supreme Court of the United States whether that is a regulation of interstate commerce or not. That is in the twilight zone, as you will readily see, and it may be very readily considered as

within the power of a State to regulate a contract made in it, and also to be performed elsewhere. This question, though, has not been settled, as far as I am aware.

Senator BRANDEGEE. Are you clear as to the constitutionality of the provision that you say you would like to have incorporated in such legislation as is framed here, imposing a penalty upon the agent of the company who, in collusion with a shipper, issues a fraudulent bill of lading?

Mr. THOM. If Congress has power.

Senator FOSTER. I would like to have you answer at the same time what your opinion is as to the power of Congress to pass legislation of this character.

Mr. THOM. I am a very strong federalist. I believe in the power of Congress over interstate commerce to the fullest extent. I believe Congress has the power to regulate the whole system of interstate commerce, in all respects, State as well as interstate. I therefore believe that it has the power to regulate the receipt, or evidence of the receipt, and the transmission of goods in interstate commerce. I feel clear that there is nothing that is beyond interstate commerce in the whole transaction. It has been suggested that if this be applied to railroads and not to other carriers, it will be class legislation. In other words, that it will come under the prohibition of the fifth amendment instead of under the provisions of the commerce clause. Without having examined the decision on that subject, I will say that my impression is that the Supreme Court of the United States has never committed itself to the doctrine that the fifth amendment is as broad as the fourteenth amendment, but it has never said, although it has reserved the question, whether or not due process of law which is required by the fifth amendment also includes the equal protection of the law. If there is nothing in the fifth amendment, therefore, as the decision shall hereafter be made to control this question, I feel absolutely certain that this legislation is constitutional. I think it is a legitimate regulation of interstate commerce. That being so, I am equally clear in my own mind that Congress has the right to impose penalties for the purpose of protecting interstate commerce against fraud; that it has a right to impose upon the agents and upon the business man who attempts to corrupt interstate commerce a penalty for attempting to do that.

Senator CLARKE. You would not have to be much of a federalist to think that.

Mr. THOM. Well, I guess I am more of a federalist than that calls for.

Senator BRANDEGEE. When you say that the railroad rates as existing at present are fixed in view of the present service performed by the railroads and the liability under which they act, and that this would be a new liability imposed upon you, and therefore ought to be rewarded, is it so that in the determination of what is a reasonable rate by the Interstate Commerce Commission that they considered this question as one of the elements?

Mr. THOM. Of risk?

Senator BRANDEGEE. Yes.

Mr. THOM. Always. That is one of the things that has always developed before the Interstate Commerce Commission, the amount of risk that is involved in shipments.

Senator BRANDEGEE. Have statistics been laid before them in the trial of cases as to whether the rates were reasonable or not showing

the amount of losses that you incurred under the present bill of lading system and those that would be estimated for——

MR. THOM. I do not think that question has ever come up before the Interstate Commerce Commission, but there is a question that came up before the commission that the proper rate on boots and shoes from Boston to Atlanta has been elaborately considered, and one of the elements that was greatly relied on as to what that rate ought to be, was the special risk in the transportation of boots and shoes—their liability to loss by theft. That has been elaborately developed in the evidence and elaborately dwelt on in the argument.

Senator BRANDEGEE. I can see that it might be one of the elements.

MR. THOM. It is considered so.

Senator BRANDEGEE. But you say that the rates at present were fixed in view of the present liability under existing law?

MR. THOM. Yes.

Senator BRANDEGEE. I did not know whether that had been specifically considered.

MR. THOM. You know no rates have ever been fixed by the Interstate Commerce Commission. The rates of the country have not yet all been fixed by the Interstate Commerce Commission.

Senator BRANDEGEE. Yes; but I did not know what the situation was with respect to some railroads.

MR. THOM. But the risk is always considered a legitimate and substantial element to justify a charge.

Senator BRANDEGEE. The risk generally of business?

MR. THOM. Yes, sir.

Senator BRANDEGEE. Do you insure against these liabilities incurred by bills of lading?

MR. THOM. The only way we do is to bond our agents to a limited extent, but you can readily understand that those bonds are small, and must be small, and that any fraud that is committed is apt to be immense.

Senator BRANDEGEE. How long ago was it that this \$6,000,000 cotton fraud was committed in bills of lading?

MR. THOM. I think that was about the year 1910.

Senator BRANDEGEE. Did I understand you to say that in the cotton bill of lading your agents specified the quality of the cotton which they received?

MR. THOM. No, sir; the marks.

Senator BRANDEGEE. I understood you to say the quality of the cotton—of a certain character or quality.

MR. THOM. No, sir; I did not say that.

Senator BRANDEGEE. It would be impossible, would it not, for a company to ascertain that?

MR. THOM. That would be impossible. One of the amendments that has been agreed upon between the bankers and the railroads is the protection of that very point.

Senator BRANDEGEE. Is there anything peculiar about the transportation of cotton under these bills of lading as distinguished from other commodities?

MR. THOM. Only that the cotton crop is a great factor in the commerce of the world, and that it has gotten to be transported as a cash article absolutely. Now, with reference to almost every other commodity, some of it goes in as a cash article and some of it does not,

but cotton is considered money from the time it goes into the hands of the railroad company.

Senator BRANDEGEE. The reason I asked that was with a view of seeing whether the precaution that you adopted as to the transportation of cotton and the prevention of fraudulent and forged bills of lading to your central bureau in New York City, of which you spoke, was to inquire whether it would be feasible to adopt a similar line of precaution in relation to any other staple commodity—such as wheat, for instance.

Mr. THOM. I think it would be absolutely possible to adopt the signature validation certificate in respect to bills of lading as to any commodity. Of course it will be a very large undertaking to have central bureaus anyway in respect to all possible commodities, but so far as the signature validation certificate is concerned there is no more impediment in respect to any other commodity than there is cotton, and I will say that in our judgment that is acting admirably.

Senator BRANDEGEE. That is all.

Senator TOWNSEND. Did I understand you to say that you have no cases of bills of lading being issued where the goods had not been delivered on your road?

Mr. THOM. I can not recall a single one.

Senator TOWNSEND. Did you read the testimony here recently, a week ago, or such a matter, by Mr. Beale?

Mr. THOM. I read part of it, and am very sorry that Mr. Beale is not here. Mr. Richter, his representative, is here.

Mr. ROBERT M. RICHTER. The testimony on page 50 of this record, concerning which Col. Thom spoke to me, I believe, is a paraphrase of Mr. Bywater's actual testimony in the criminal case against Knight, together with certain evidence as brought out in other cases. I have here the printed record in the case, on appeal to the Circuit Court of Appeals, of *Lovell v. Hentz*, where it shows that Mr. Hunter testified that the telegram and messages relative to this cotton, in which he said that the cotton had been forwarded via the Potomac yard, had been sent on April 13. He said the cotton had not been sent until April 14, according to his records, but that the telegram had been sent by his office—I have not the exact wording of the testimony, and have only these piecemeal suggestions.

Mr. THOM. I have been trying to find the basis of what Mr. Beale said so far as the Southern Railway is concerned.

Mr. RICHTER. Let me call your attention—

Mr. THOM. Let me make an explanation about that. I wanted to do that while I was on my feet.

Senator BRANDEGEE. Go on.

Mr. THOM. I will be very glad to postpone what I have to say if you desire.

Senator BRANDEGEE. No; go ahead.

Mr. THOM. What I wanted to say with respect to that is that I have been seeking to find where there was any evidence of our agents that would justify that comment by Mr. Beale. I have the evidence here, and I have had it examined by our counsel who was in the case, and he telegraphed me as follows in respect to it:

Am sending you by United States mail to-day evidence in *Henry Hentz & Co.* as transcribed by the court reporter. You will find the matter we talked about in evidence of witness J. N. Hunter, pages 8 to 17, inclusive. We have had no such conference as was mentioned to you.

Now, I have not been able to examine this myself, but I have asked the representative of Mr. Beale, who is here, to show me a suggestion to justify that, and his statement is such as you have just heard, and it is not satisfactory to me, in so far as the agent of the Southern Railway is concerned.

Now that transaction was this, as I told you in the beginning: Here was a fraudulent bill of lading issued, which got into the hands of Henry Hentz & Co., for certain cotton. There was no cotton at that time delivered. There was cotton afterwards with the same marks and of the same quantity delivered to the railroad company and a bona fide bill of lading taken out. Now, Henry Hentz & Co. had their suspicions aroused, as I understand it, after the bona fide bill of lading had been taken out, and the cotton actually delivered, and when they asked the agency as to whether that cotton had been received and gone forward, the agent's mind went to the bona fide transaction of the receipt by him of the cotton, and of the bona fide bill of lading which he had issued, and his answer was in reference to that, while Mr. Hentz's inquiry was with reference to what he held, which was a fraudulent one.

Senator TOWNSEND. What did you do, or your agent who issued the fraudulent one?

Mr. THOM. He did not issue it. It was a forgery.

Senator TOWNSEND. Let me read what he said. Perhaps it will make it clear. I read from page 49 of this record. He says:

I am not going to weary the committee by bringing a lot of data to prove that, but I merely want to show you as to Col. Thom's railway exactly how it is worked. There is a firm of H. Hentz & Co., of New York, that I represent. H. Hentz & Co. had an offer by telegraph from people that they had dealt with previously thereto and who had been honest to sell Hentz & Co. some cotton at a certain price. The wire said, "I will sell you 2,000 bales at the market price. Will you take it?" Hentz & Co. wired back, "Ship it; bills of lading to order, notify; attach ladings to sight drafts. We will pay on presentation."

The bills of lading with drafts attached came in due course through banking channels and were presented and \$135,000 was paid for the drafts on the strength of the bills of lading. The shipments thus represented were divided into four lots—one lot over the Louisville & Nashville Co. from Decatur, Ala.; one lot over the Southern Railway from Decatur, Ala.—Col. Thom's road; one lot from Selma, Ala., over the L. & N. Railway; and one lot over the Southern Railroad from Selma, the two points being 300 miles apart, so we have four railway agents in two different towns being concerned.

Hentz & Co. wired to the four railway agents—they first wrote a letter and said, "We hold bills of lading signed by you, dated so-and-so, from such-and-such a city, for so many bales of cotton, marked 'P' or 'L,' of a certain weight," as the case was. Could there be any clearer or better identification than that? They addressed four letters to four railway agents. Not getting a reply, Hentz & Co. wired and said, "We want to know whether you signed the bills of lading. What about the cotton?" Those railway agents could hardly have been in collusion at the time, because, as I have said, they were 300 miles apart, and yet each one of those railway agents wired—I have the record here of testimony under oath to corroborate my statement should it be questioned by Col. Thom or Senator Faulkner; I will not offer the record in evidence, but merely state for the sake of brevity what the record shows; each one of those railway agents wired—"Your cotton went forward to-day via the Potomac Yards." Hentz & Co. were not suspicious. Why should they have been? The replies were from authorized agents of the railroads. They did not know there was a "nigger in the woodpile," about the telegram. It subsequently developed that the cotton was not in possession of any of the railway agents. It was not in the possession of a single railway agent, and when a telegram was sent by each one of them to the effect that the cotton was under way it was an unqualified falsehood. When—in the trial of the case in the civil courts not against the railroads, because, by virtue of the United States Supreme Court's decision, we had no case against the railroads—the question was put to the agents, "Why did you send that telegram?" "Well, we do not know." Then was asked, "As a matter of fact, you had not received the cotton and it was not under way?" "No." "Then the telegram that you sent was an unqualified falsehood?" "Yes."

Those railroad agents are still in the employ of the railways to-day, which, to my mind, is a significant fact.

Mr. THOM. Now, I would like the representative of Mr. Beale to point out where that evidence is in the record.

Mr. RICHTER. Mr. Chairman, Mr. Beale in making that statement, I believe, paraphrased the testimony. I do not think the words he used were the exact words in the testimony. He referred to the case of Lovell v. Hentz, the record of which I have here, and he referred also to the criminal case brought against John W. Knight, and I think he paraphrased the testimony in both cases, showing just exactly the situation that Mr. Hunter—

Senator TOWNSEND. Who is he?

Mr. RICHTER. The agent of the Southern Railway in Selma, Ala. I might say in this connection that Mr. Knight testified that he had made an arrangement with Mr. Hunter whereby bills were to be signed and issued by Mr. Knight and then subsequently Mr. Hunter would come into Mr. Knight's office and issue original and genuine bills of lading after the cotton had been delivered to the Southern Railway. That arrangement was testified to by Mr. Knight. It seems that Hentz & Co. wrote on April 8 to the general freight agent of the Southern Railroad at Selma, Ala., as follows:

NEW YORK, April 8, 1910.

GENERAL FREIGHT AGENT,
Southern Railroad, Selma, Ala.

DEAR SIR: We hold bill of lading dated Selma, Ala., for the following cotton, shipped to us by Messrs. Knight, Yancey & Co., to order notify us: March 29, POL 200 bales; March 31, FAT 200 bales; March 31, AIP 100 bales.

Kindly inform us how this cotton is routed and where it is located at the present time, and oblige

Yours, truly,

H. HENTZ & Co.

The witness, Mr. James W. Hunter, the agent at Selma, then proceeded:

I never saw that letter personally until two weeks ago. The record shows that this letter came to my office. I am pretty sure that I was not at my office when this letter arrived. I was away all that week, I think, except the 15th and 16th. I had somebody there in my office who attended in part to my business when I was absent. He is designated as "chief clerk." My record doesn't show a reply to that letter between April 8 and 13. My record shows a telegram received from H. Hentz & Co., but I don't know what date it came in on. I have the telegram here and hand it to defendants' counsel. And defendants then offered said telegram in evidence and read it to the jury. The same was in words and figures, to wit:

APRIL 13, 1910.

TO GENERAL FREIGHT AGENT,
Southern Railway, Selma, Ala.:

Have no reply to our letter of 8th, also want some information about shipments eight PIG 100, SAP 200, RAG 200, SIX 200.

H. HENTZ & Co.

The witness proceeded:

I was not in Selma on April 13. My office received a letter from Henry Hentz & Co., dated April 14, 1910. I hand said letter to defendant's counsel. Defendants then offered said letter in evidence and read it to the jury. It was in words and figures as follows:

NEW YORK, April 14, 1910.

J. W. HUNTER, Esq.,
Agent Southern Railroad, Selma, Ala.

DEAR SIR: We wrote you on the 8th instant, stating that we hold bill of lading dated Selma, Ala., for the following cotton, shipped to us by Messrs. Knight, Yancey & Co., of Decatur, Ala., to order notify us: March 29, POL 200 bales; March 31, FAT

200 bales, and March 31, AIP 100 bales, and we ask you to kindly inform us how this cotton was routed and where it was located.

Having received no reply to said letter, we wired you yesterday afternoon as follows: "Have no reply to our letter of 8th—also want some information about shipments 8th PIG 100 bales, SAP 200, RAG 200, and SIZ 200," and we thank you for your reply received this morning, saying the cotton was forwarded for New York via Potomac yard, account Knight, Yancey & Co. We presume this applies to the whole 1,200 bales mentioned above.

Yours, truly,

H. HENTZ & Co.

Now, this letter from Henry Hentz recites having sent the two telegrams to the Selma agent and having received absolutely no reply. When that is taken in connection with Mr. Knight's testimony in his criminal case that he had the arrangement with Mr. Hunter that these bills of lading could be issued by Mr. Knight, it seems to me that it is a significant fact that Mr. Hunter does not reply to this request, even though sent by telegram, until April 13, when he says:

SELMA, ALA., *April 13, 1910.*

H. HENTZ & Co., *New York, N. Y.:*

Your wire date cotton forwarded for New York via Potomac yard account Knight, Yancey & Co.

J. W. HUNTER.

The witness proceeded:

The record doesn't show that the Southern Railway Co. had received the 200 bales of cotton marked POL on April 13, when the message was sent. I did not send it; my office sent it. The record shows that the said railway company had not received said cotton when the message was sent.

Mr. Beale in his remarks, to which Col. Thom takes exception, for the sake of brevity did not give the testimony in the exact wording for each of the four points involved. He merely paraphrased all the evidence which was brought out in all of the cases. This testimony was in general and substantially similar to Mr. Beale's remarks.

At this point the committee took a recess until 2 p. m.

AFTER RECESS.

At the expiration of the recess the committee reassembled.

STATEMENT OF ALFRED P. THOM—Resumed.

The CHAIRMAN. Mr. Thom, had you finished your statement?

Mr. THOM. I had not, Mr. Chairman. Senator Townsend had asked me a question and I had not replied to it. He is not present, but I will say that the committee has heard the explanations made by Mr. Richter, representing Mr. Beale. I know Mr. Beale personally, and I am quite confident he would have made no statement he did not believe justified by the record. You have heard what his representative has said and how he has pieced out the testimony of the witness and the testimony of the man who was accused of forgery. At the same time I do think it just to say that this deposition that is produced here bears the interpretation that a telegram was sent on the 13th of April saying that cotton would go forward by the Potomac yards, which was received on the 14th of April.

Now, when we come, however, to examine that transaction, and if it bears the interpretation that has been put upon it by Mr. Beale, it is a mere illustration of what I have been trying to present to this

committee. Suppose, as Mr. Beale thinks, that between this subordinate of the railroad agent and Knight, Yancey & Co. there was a fraudulent conspiracy to use the railroad's name as a basis for credit on that 200 bales of cotton. It simply shows the additional and the heavy risk that may be put upon the railroads by collusion between the shipper and the agent.

I would like also to say to the committee that this idea of having an additional charge for additional risk is nothing new. It exists throughout the present systems of the railroads. For example, take the live-stock bill of lading. There is one rate for one valuation of live stock and another rate for another valuation of live stock, the difference being not in the physical act of carrying the live stock, but in the difference in risk between the value of the live stock shipped under the two different conditions. The same thing applies as between a released and unreleased bill of lading. There are certain released bills of lading that have been in operation and in effect on the railroad for which there is one rate. There is an unreleased bill of lading that carries a larger liability than another rate.

Now, the suggestion that I am making is that this additional risk is put upon the railroads in order to accommodate the requirements of commerce, but there should be an additional compensation for it.

Senator TOWNSEND. Your road would not suffer anyway under these circumstances, according to your statement, because you do not ship goods or issue bills of lading where you do not have the goods.

Mr. THOM. They are our orders that it shall not be done.

Senator TOWNSEND. Therefore, you would not suffer from this if your business continued in the future as it has in the past?

Mr. THOM. Yes; we would if the agent disobeyed our orders. I want to call attention to this difference in the condition that would be produced by it. Mr. Bond alluded to it in his argument this morning. Here we have a situation now where there is no inducement, or a comparatively small inducement, to get the railroad's signature, or the railroad agent's, to the bill of lading because it does not carry any responsibility with it. But, now, suppose you change the law so as to make the responsibility of the railroad correspond to the acknowledgments of its agents. You then put it into the power of the agent to hold out the temptation to the dishonest agent and the dishonest shipper to evade all that credit furnished by law, and therefore make a great inducement to enter into these transactions.

Senator TOWNSEND. That leads up to this question: A number of the States have these laws, and the States with which I am familiar that are doing a large business, like New York and Pennsylvania, are not governed by the decision that you quoted here in the Friedlander case, but they hold in those States that the carrier is responsible for the acts of his agents. Does this condition of increasing fraud maintain in those States that you have mentioned?

Mr. THOM. I understand there is a very conspicuous instance where it does in the present litigation of the Delaware & Hudson Railroad. Counsel was here in the room this morning, and I expect he will be back.

Mr. JAMES. That arose before the New York act was passed entirely. The New York act was not passed until last August.

Mr. THOM. I do not understand that to be the case.

Mr. BOND. It is the New York interpretation of the act that Mr. Thom speaks of.

Mr. THOM. There is a different ruling in a number of the States—from that given by the Supreme Court of the United States, and under the New York ruling the same principle applies there that is now established by statute, and the contention there is that the responsibility of the railroad is behind the act of its agents in this Delaware & Hudson litigation.

Senator TOWNSEND. That is my understanding of the practice in those States.

Mr. THOM. If you will just let me read into the record for the convenience of you gentlemen the authorities, in addition to the case I referred to this morning in the Supreme Court of the United States, governing this matter, I will do so. It is as follows:

The schooner *Freeman v. Buckingham* (18 Howard, 189); the *Lady Franklin* (8 Wallace, 325); the *Delaware* (14 Wall., 601, 602); *Pollard v. Vinton* (105 U. S.); *Mountain R. Co. v. Knight* (122 U. S., 79); *Friedlander v. T. & P.* (103 U. S., 416); *Missouri Pacific Railway v. McFadden* (154 U. S., 155).

Senator TOWNSEND. Now, in connection with that, I think the carrier ought not to be responsible for the acts of its agent. If I recall the testimony which has come before the committees of Congress heretofore, there has been quite a custom among railroads and the agents of railroads to get business—to struggle for business—and where one railroad does not act unconscionably toward a shipper another road would in order to get that business. Now, it occurs to me that this freedom from responsibility or liability on the part of the railroad would rather tend to encourage that kind of business. If it could be held that the carrier was not responsible for the act of its agent, it could be held as the irresponsible act of an agent and not the act of the carrier itself. That has occurred to me a good many times.

Mr. THOM. I think there is substantial ground for your idea, Senator. I think there is no objection whatever to stopping it. I think, perhaps, the interests of business would be promoted by it; but we can not lose sight of the fact that the charges of the railroad companies have been based upon that degree of risk. Now, if you increase it, I think there ought to be recognized in the law that does it—because that is the only way the carrier will ever get it—the righteousness of a reasonable charge to cover the difference in conditions under which business is done.

Senator TOWNSEND. Do you think, if you had an extra charge, or were permitted to make an extra charge for carrying freight under bills of lading issued according to these bills, or the proposition suggested, that you would be better able to protect yourself against the fraud of your agent?

Mr. THOM. I do; if you couple that with the penalty.

Senator TOWNSEND. Suppose we had the penalty without the other; if you could do it at one time you could at another time, could you not?

Mr. THOM. So far as protecting ourselves is concerned, we could protect ourselves in one condition as well as the other; but we could not get rid of the risk in any event, and for that reason, if we could not get rid of it, we ought to be paid.

There being no further questions, Mr. Thom was excused.

STATEMENT OF W. A. COLSTON, COMMERCE ATTORNEY, LOUISVILLE & NASHVILLE RAILROAD CO., LOUISVILLE, KY.

Mr. COLSTON. Mr. Chairman and gentlemen, there is very little that can be added to what Mr. Thom has stated, except that, while the illustrations he has given sustain our contention that there is no necessity for this regulation, he appears to acquiesce in the fact that some regulation may be needed of this sort. The Louisville & Nashville Railroad Co. does not obstruct and will not oppose any act of this nature or of a similar nature which is necessary. We realize, of course, that the law must keep pace with business. If business requirements are such that you have to change the law, well and good; but the law should follow and should not blaze out the way of business in matters of such serious import as this. I do not believe that there is any commercial necessity for so radical a change of the law of responsibility as is contemplated by either the bill introduced by Senator Clapp or the bill introduced by Senator Pomerene. Both of those bills, of course, seek to make the railroad or the carrier responsible for what they never have been responsible under the the common law of England or under the law as it applies in the Federal courts. While there have been States in which the contrary principle has been applied, as far as the Federal courts are concerned and as far as interstate commerce is concerned, these acts seek to change radically the liability of the carrier. They seek to give the force of a negotiable instrument and apply the rules of the law merchant to a mere receipt which has always been interpreted under the strict rules of common law.

Now, I say that there is no commercial necessity for such a change in the doctrine of liability. The representative of the Baltimore & Ohio Railroad has told you this morning that in his long experience with his company he knows of no serious losses which have resulted from the issue of a genuine bill of lading by goods not being received. Mr. Thom has told you the same with respect to the Southern Railway.

I would like to read a paragraph from a letter written by Mr. Milton H. Smith, president of the Louisville & Nashville Railroad Co., to Mr. Alfred H. Brandeis, general solicitor of that company, on February 23 of this year with respect to this question. He writes as follows:

Nevertheless, is it a matter of practical importance? In my long experience I do not now recall but one instance coming to my knowledge where an agent issued bills of lading for property that had not been received. I think about 30 or 35 years ago an agent at, I believe, McLeods Station, on what is known as the Guthrie branch of the Memphis Line, who was also buying and selling wheat, issued bills of lading for several carloads of wheat which were not shipped. Some litigation ensued, but I do not now recall the result.

And if we go through the list of cases or instances that were presented by those who have previously spoken before the committee with respect to these bills, you will be convinced, I believe, that the change of liability sought by these bills which pertain to genuine bills of lading is not of any consequence. The whole trouble is that the gentlemen who are proponents of these bills, who are advocating them—I speak now of those representing the banking interests—have the wrong sow by the ear.

The act does not reach the real evil at all. The real evil is, as Mr. Thom has so forcibly pointed out, not the issue of genuine bills of

lading by agents of railroad companies for property not received, but the evil is the issue of forged bills of lading by those who have never been authorized to issue them. All of the troubles in the South with respect to cotton shipments were cases of forged bills of lading. They were not cases where the agents of railroad companies had issued bills of lading for shipments not received. They were not cases where the railroad agents in an effort to secure business—as was hinted at by those who have spoken on the other side of this measure—by an improper act issued a bill of lading for goods that they did not receive. We agree with them that bills of lading should not be issued for property which has not been received by the railroad agent; and I believe, as Mr. Thom has said, that the railroad agent, or the officer of a railroad company and the shipper—the ostensible shipper—who receives such a bill of lading should be punished for the issue of a bill of lading for property not received. I think it should be made a criminal offense.

But the Knight and Yancey trouble and most of these troubles that the gentlemen have presented to you, as the record in that case, previously taken, shows, would not be obviated in any respect by the passage of these bills. These bills relate to genuine bills of lading for property not received. The trouble comes not from forged bills of lading for property which may never be received, but which in the principal case which we have before us was for the greater part afterwards turned over to the railroad company and genuine bills of lading issued therefor.

Now, I say, gentlemen, that addressing ourselves to the change in the liability covered by these bills—the change in the principle of the law which would hold the carrier responsible, and that alone—there is no necessity for such a radical change in the law. No losses have been shown which would justify it; no loss of confidence; no demand of foreign bankers that would justify that particular change in the law. Foreign bankers, foreign brokers, purchasers of cotton do demand a bill of lading upon which they can rely, and their demand in that connection arises not from the issue by railroad agents of bills of lading for cotton not received, but by the forging of bills of lading by those who had no authority, express, implied, actual, or apparent, to sign such bills of lading in any event.

So I say, in the first place, that there is no commercial necessity for these acts, and I say, secondly, that as these acts relate only to genuine bills of lading they do not reach the real evil, which is the issue of forged bills of lading by those who wish to defraud the railroad companies and others. There is not a word in these acts that will go to prevent the issue of forged bills of lading. On the contrary, I think it is the third point against the bills, that they would encourage the very evil which we are seeking to correct.

I shall not reiterate what Mr. Thom has said at any length, but it is plain to any of you that if the issue of a bill of lading is to have the effect of a piece of quasi negotiable paper, and it is easy to raise money upon that bill of lading, you are putting a premium upon crime. Heretofore there has been no incentive, no great incentive, to the forging of these bills of lading if there was a proper check by the bank by which the paper supported by these bills was first negotiated, but if you pass these acts and make these papers worth more on their face you are going to have more cases of forged bills of lading, and I say that

these acts instead of remedying the trouble provide no remedy for all this trouble that has been caused for all this lack of confidence abroad. If everything that has been presented in favor of these bills—I say that all these evils that have been advanced as reasons for these bills will be intensified and in no wise remedied by the bills.

Now, there are other things that are especially apparent in the State bill or the Pomerene bill, and in the bills throughout, and that is that not only are the bankers, as proponents of these bills, seeking to make a bill of lading mean more, seeking to put our commerce on a firmer footing, but they are seeking to throw all of the responsibility on the carriers and escape any responsibility on their own part. I may refer specifically to sections 35, 36, and 37 of the Pomerene bill. Section 35 takes care enough that the person “who negotiates or transfers for value a bill by indorsement or delivery, including one who assigns for value a claim secured by a bill,” shall warrant that the bill is genuine. But then, when the first banker comes in, that warranty stops.

Section 36 provides—

That the indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

Section 37 provides—

That a mortgagee or pledgee, or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or for any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described.

In other words, gentlemen, the bankers will act as mere bailees. They propose that these bills of lading shall come into their hands; that the carriers shall be absolutely accountable, absolutely responsible; shall warrant everything that they do; that the shipper shall warrant that the bill of lading is genuine, but the first banker who negotiates a piece of paper that the shipper gives may take that bill as mere security—may take it as a pledge and escape the liability as to any warranty of the genuineness of that bill.

Now, what would be the practical effect of that? If an agent in the northwestern grain fields, of which there are hundreds, issues a bill of lading, order notify, for a carload of wheat, or any other kind of grain, consigned to, say, a grain user in the city of Birmingham, Ala., or to the order of some one, notify, a person in Birmingham, Ala., the agent of the Louisville & Nashville Railroad Co., or the Southern Railway Co., or of the Frisco Line, or of the Central Georgia—or whatever other line may handle the business into Birmingham—must determine at his peril whether or not that bill of lading is a genuine or a forged instrument. If the shipper has secured a genuine bill of lading, and then issues a forged bill of lading, or if some one who ascertains that that shipment has been made issues a forged bill of lading, that person by going to the bank at the point of shipment can draw against Birmingham and attach that bill of lading—that forged bill of lading—as security. The bank at the point of shipment does not warrant in any way the genuineness of that bill of lading. No intermediate bank warrants the genuineness of that bill of lading. The bank at Birmingham does not warrant the genuineness of that bill of lading, and the consignee or

the final holder of that bill of lading will not know that it is a forged bill of lading.

The result is that the consignee or the final holder of that bill of lading will pay the draft and the railroad company, whose agent can not know the signature of every agent in the country, will almost certainly deliver that shipment on that forged bill of lading provided it gets there before the real bill of lading arrives. The real bill of lading arrives, and who is responsible? The carrier is responsible, and he can not look to any bank or banker in the chain from the point of origin to destination for a warranty that such bill of lading is genuine. I say that if it is necessary to make any law to protect our bills of lading we certainly should cut out sections 36 and 37, or should preferably make them read the other way. We would say that a mortgagee or pledgee, or other holder of a bill for security who demands or received payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person *shall be deemed* by so doing to represent or warrant the genuineness of such bill or the quantity or the quality of the goods therein described.

There certainly will be no hindrance to commerce resulting from increasing the care that bankers will take in transmitting bills of lading as security for negotiable paper, and those two sections would simply mean that the banker would be without any responsibility whatever to anyone; could take a forged bill of lading or any other fraudulent bill of lading, and the banker would not take the pains to inquire at all what the circumstances under which that bill of lading was executed. Instead of bettering things, gentlemen, it seems to me that those two sections especially, and the spirit of the act as a whole as it is drawn, tend to make the bankers careless, tend to cause more trouble than now exists, and do not in anywise correct any of the evils that have been brought to your attention.

I believe Mr. Thom has covered the other points that I intended to bring to your attention. I wish merely to emphasize what he has said with respect to the necessity for compensation, if it is desired, if it is necessary, that the common-law rule as to receipts which now apply to bills of lading, shall be changed so as to make the rule of the law merchant apply, and shall make carriers subordinate the business of transportation, which is their special business, to the business of banking, in which they are not concerned. If the interests of commerce demand that, unquestionably the carriers should receive some compensation.

I thank you, gentlemen.

Senator BRANDEGEE. I notice on page 83 of these hearings on this bill that Mr. Frank A. Horne, president of the Merchants' Refrigerating Co., of New York City, testified the other day, and I inquired of him, as will appear on page 86, as follows:

Senator BRANDEGEE. Are you able to state what percentage of loss you incur under the existing law by reason of attaching these drafts and not having the goods turn up?

Mr. HORNE. Our concern has met with no direct loss; but there have been numerous instances on the part of our customers, the commission men.

At the top of page 87 I asked him this question:

Senator BRANDEGEE. Is there any loss except where the bill of lading is issued by the railroad company's agent without the goods having been received by the railroad?

Mr. HORNE. That is the main difficulty.

Is there any way of ascertaining in the case of any particular railroad, or are there any statistics in existence that you know of which would show in the case of all the railroads what the percentage of loss is, as compared with the amount of business done, by reason of the bill of lading being issued and the goods not delivered to the railroad company?

Mr. COLSTON. I do not believe that can be ascertained from any statistics in the possession of the railroads.

Senator BRANDEGEE. You stated that so far as your railroad—the Louisville & Nashville—is concerned, you did not know of any instances.

Mr. COLSTON. I do not know of any, and I say our president, who has had many years' experience, and is the Nestor of railroading in the South, says he knows of only one instance. He does not know what the result was of the litigation that was had in that case.

Senator BRANDEGEE. That was contained in the letter that you read?

Mr. COLSTON. Yes, sir.

Senator BRANDEGEE. And the attorney of the Southern Railway, as I remember it, says that he knows of no such instance.

Mr. COLSTON. And also the general counsel of the Baltimore & Ohio Railroad, I believe, so stated before the committee this morning.

Senator BRANDEGEE. What did you say your official position was?

Mr. COLSTON. Commerce attorney.

Senator BRANDEGEE. Do you meet similar officers of other roads?

Mr. COLSTON. I do.

Senator BRANDEGEE. Do you know anything about the feeling among them as to this particular question, or their knowledge on this subject, as to the percentage of losses that now occur?

Mr. COLSTON. No; I have not discussed this with the attorneys of other roads except within the last day or two, and, as I say, I know that it will be impossible for them to say what would be the percentage of losses, for the reason that under the rule announced in the Friedlander case there would be no losses falling upon the railroad companies for that reason.

Senator BRANDEGEE. I do not mean financial losses in the shape of judgments which the railroads had to pay in suits; I mean the amount of goods lost—the amount of loss incurred by the consignee by having to pay the draft that was made upon him by the consignor without getting the goods.

Mr. COLSTON. There is no record in the railroad company, or kept by the railroad company, that would show that. Of course, they have no record of the consignees' losses.

Senator TOWNSEND. I was interested in your statement in reference to what you claim was the lack of liability on the part of the banker. My attention has been called to section 35 of the bill, which states:

That a person who negotiates or transfers for value a bill by indorsement or delivery, including one who assigns for value a claim secured by a bill, unless a contrary intention appears, warrants—

(a) That the bill is genuine.

(b) That he has a legal right to transfer it.

(c) That he has knowledge of no fact which would impair the validity or worth of the bill.

Mr. COLSTON. Yes. That would not, I believe, hold the bankers, in view of section 37. Section 35 would hold the shipper who assigned his claim against the consignee or against the buyer, but if the shipper should draw his draft on the buyer and should negotiate it with the bank at the point of shipment, and should simply give the bill of lading as security, the bank would take it as a pledgee.

Senator TOWNSEND. But the bank would be held, would it not, except as against the wrongs of a carrier? The bill provides:

That the indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

"Failure on the part of the carrier." Now, they are liable, as I take it the intention of the bill is, except for the faults of the carrier.

Mr. COLSTON. No; section 37 provides that "the mortgagee or pledgee or other holder of a bill for security."

Senator TOWNSEND. I am talking about section 36, as you suggested that too.

Mr. COLSTON. I stated that section 36 will hold the shipper who first sells his claim, with the bill as security, to the bank, and the bank will take as a pledgee. They would be merely a bailee.

Mr. JAMES. May I make a suggestion at this point? You will notice that section 36 refers exclusively to the negotiation or transfer of a bill; whoever negotiates or transfers a bill assumes the full obligation set forth in section 35. Section 37 does not deal with the negotiation or transfer of a bill at all. It simply says that the bank that receives payment of a debt for which such bill is security shall not be liable, because it receives payment. Section 37 is absolutely in harmony with every judicial decision except that of two States, Texas and Tennessee, and one of those States has repudiated that decision. If the bank should, under section 36, assign the bill it is liable for its indorsement. Section 35 is an entirely different subject matter to sections 36 and 37.

Mr. COLSTON. Our point is that if you are going to radically change the law with respect to the liability that exists, and which has been held to exist uniformly by the rules of common law and not of law merchants, we might as well go further, and, regardless of what may have been the judicial decisions, make the banks responsible.

Senator TOWNSEND. I think I get your point on that. I simply wanted to get your idea of it, because I had been looking that over a little bit. Have you any objections to holding the railroads responsible for what it and its agents actually say in the bills of lading?

Mr. COLSTON. I have, beyond the scope of the agent's authority. I have objections to holding the railroad responsible for what the agent does beyond the scope of his authority.

Senator TOWNSEND. Do you think it is proper for a railroad to issue an order bill of lading which is not such in fact?

Mr. COLSTON. I do not, and I think the agent who does so should be punished as a criminal for issuing such a bill of lading.

Senator TOWNSEND. And you do not believe that orders ought to be issued except where goods have been delivered?

Mr. COLSTON. I do not.

Senator TOWNSEND. Do you think it is impossible for the railroad to see to it that orders are issued by responsible parties of the railroad in reference to goods which have been delivered to it?

Mr. COLSTON. As a practical matter I think it is impossible for the railroads to protect themselves against the issue by ignorant or vicious agents over whom they have only a loose control.

Senator TOWNSEND. These orders are not issued usually by ignorant men, are they? You do not have much trouble from the little places where one of the witnesses said they had hard work to get good men to do the work—you do not have trouble from such offices as that with reference to these orders, do you?

Mr. COLSTON. Well, grain may be issued from the smallest station on the road, and cotton may be issued from the smallest station on the road, if it is in a cotton country.

Senator TOWNSEND. If I am correctly informed, these troubles originate not in these small places, but in the larger places where you do have competent agents, or could have with the exercise of proper judgment and discretion. Am I correct about that.

Mr. COLSTON. I do not think so, Senator. I think you are correct in stating that the majority of the cases where order bills of lading are issued and where shipments of large value are forwarded, arise in the large places, but if these bills, as they are drawn, become effective, we would be held by the signature of the most irresponsible agent of the road, and he might take a place on our road where the entire freight received and forwarded during the month would not amount to more than \$40.

Senator TOWNSEND. I can see why you are interested in that and why it is proper for you to discuss it, but I am talking about existing conditions now, not as to what might happen if some law were passed. I am speaking of the evils as we find them now.

Mr. COLSTON. I believe practically every station in Alabama, south of Decatur, ships cotton.

Senator TOWNSEND. I realize that.

Mr. COLSTON. And if the agent can issue a bill of lading for 5 bales and hold the company, he can issue bills of lading for 500 bales and hold the company.

Senator TOWNSEND. I understand from Mr. Thom that if you were properly compensated you could avoid those evils.

Mr. THOM. I did not say avoid.

Senator TOWNSEND. Well, reduce them to a minimum.

Mr. THOM. I said we could be paid for them and be assured against them by the additional charge.

Senator TOWNSEND. You think the railroads should exercise proper care in selecting their agents?

Mr. COLSTON. Undoubtedly; but I have had experience in other departments of railroads than the law department, and I know it is a practical impossibility to get agents at the smaller stations who would not be imposed upon, if they are honest, and who would not, through their lack of this world's goods, fail to be influenced by a pretty good bribe, if they were not honest. I know that we have to get as agents, if at a telegraph station, men who can merely "pound brass," as they say—merely operate the telegraph, take a train order, send a train order, and who can not even add up a column of figures in the proper way, and would have to be straightened out in their accounts month after month by the traveling auditors, and who are a burden upon us as it is, and if those agents could make us responsible

for hundreds of thousands or millions of dollars—as in the cotton case—I say we would be helpless indeed.

Senator TOWNSEND. You would not have those if you were responsible; you would not get those fellows who can only pound brass; you would get men who were competent to do that work? Has not the public a right to demand that you shall put competent men in charge of this important work?

Mr. COLSTON. I say that if such steps are taken, if they are needed or are necessary, the railroads should be compensated for it. I do not think they are necessary because I believe that if the banks at the point of shipment would exercise the same care in dealing with their shippers that they exercise in dealing with their other customers, there would be less fraudulent bills of lading going forward, and I think the initial bank should warrant the integrity of its customers in matters of bills of lading just as it warrants the integrity of its customers in other matters.

Senator TOWNSEND. I quite agree with you that the bank ought to fulfill its full duty with reference to this matter. If there is anything lacking I would like to know about it. But personally it occurs to me that the railroad ought to use a little more care in many respects. Your road evidently does. The road of every man who has been on the stand seems to be exercising perfect care in reference to these matters, and no such cases as are complained about here are found on those roads. Perhaps some of the roads will appear later, where the evil occurs. I think that is all I care to ask.

There being no further questions, Mr. Colston was excused.

**STATEMENT OF SANFORD H. E. FRUND, NEW YORK CITY,
EASTERN ATTORNEY OF THE CHICAGO, ROCK ISLAND &
PACIFIC RAILWAY CO.**

Mr. FRUND. Mr. Chairman and gentlemen of the committee, I agree with what has been said by Mr. Bond and Mr. Thom, and I agree that it is desirable that legislation should be enacted to correct any evil that does exist, but I think this committee will also agree that legislation should not be any broader than the need for it.

Now, what is the evil that is sought to be corrected? You want to protect the banks and people dealing with bills of lading. What bills of lading do they deal with? Only the order ones that are used as a basis of credit. Now, it is not the amount of those order bills that you have got to consider alone—that is, the number of dollars involved in the order bills—but the percentage that those order bills bear to the total number of bills of lading that are issued, because if you make a general bill you are compelling the railroads to take the same care with the straight bills as with the order bills, and you bring about the difficulties stated by Mr. Bond this morning—that the railroads would be unable to transact business in the way that it must be done now in order to get through on time.

Now, the figures as we get them are that only 2 per cent of the number of bills of lading issued—approximately 2 per cent—are order bills of lading. Consequently it would seem to me that the bills before this committee—now, the bill introduced by Senator Clarke and the bill introduced by Senator Pomerene—are too broad and are

legislations much wider than the necessities of the evils that we want to correct require, because they apply to all bills of lading.

Now, these 2 per cent of order bills, what should be done for them? It is perfectly obvious that you can not protect against forgeries by any legislation that you enact because no legislation can make a railroad responsible for a forged bill, and would not attempt to. The cases you want to reach are the cases of collusion between the railroad agent and the shipper. Now, is it necessary, in order to reach those few cases—2 per cent of the total number of bills issued—to enact bills that would require a large amount of additional work on the part of the railroads, as Mr. Bond has pointed out, and hamper the business as it is transacted to-day? Can not the same result be reached in another way? If the cases—and I think nearly everyone will admit that the cases that you want to reach are the cases of collusion—are the cases that you want to reach, can not those be reached by the imposition of criminal liability upon the agent of a railroad who issues a fraudulent bill—that is, a bill which does not represent goods received—and on the shipper at whose instance he does it? I agree with Mr. Bond that if Congress has the power to enact legislation on this subject at all it undoubtedly has the power to impose penalties because the power to regulate commerce would be of little value if Congress did not enforce its legislation. And if the violations of the legislation are criminal in their nature, Congress must be able to impose penalties to enforce its laws.

Now, a criminal statute would operate in that way. Criminal penalties imposed on the agent who issued a fraudulent bill, and on the shipper, would reach promptly the evil which you are trying to correct. You could also, in addition, in order to cover the case still more carefully, provide for a certified bill of lading, or for an exchange of bills, as Mr. Bond indicated, on request; provide that every railroad should, upon request of the shipper, issue a certified bill, but for that service the railroad should be entitled to make a charge. There is no reason why a railroad should be responsible for the act of its agent in issuing a bill of lading to anyone but the person from whom the goods are received. That is in the nature of things; a bill of lading is not the same as other negotiable paper. A bill of lading is a receipt. Merchants and shippers and bankers want to make it a negotiable paper. They want to treat it just as they would a draft or a bill of exchange or anything else of that kind, but if they want that, then the railroad ought to receive some compensation for that additional character put upon the bill, because the railroad has no interest in that bill. It has no interest in the property represented by the bill of lading. The railroad is merely transporting and is receiving compensation for transportation, and for nothing else. Now, if the railroad is in addition to give a receipt, and being responsible for the transportation of the goods, to stand back of the bill as it does back of a negotiable instrument, the railroad is entitled to compensation.

An additional reason why the railroads should not be responsible when the bill is attached to a draft, is, as stated by Mr. Colston, that the bank—the first bank at the place of shipment—has just as good a chance to at once find out whether there are goods back of that bill of lading. There is no reason why the railroads should guarantee

that there are goods back of the bill of lading without compensation, in order that the bank may go right ahead blindly and take that course. It would not take any other paper, or collateral, offered by its customer without investigation. Why should not the banks investigate the bills of lading that are offered to them at the point of shipment just as much as they investigate other paper offered to them by their customers? If the banks want to make the railroads insurers and go ahead without any further investigation of the bill of lading, then the railroads ought to be entitled to have additional compensation for becoming insurers.

Now, Senator Townsend has asked how the taking of additional compensation would help us avoid the difficulty? It would not help us avoid the difficulties, but it would enable us to protect ourselves against them by insuring. It would be just like a premium for any other kind of insurance, or guaranty bill, or becoming sureties on the bill, so to speak, and to take a premium for so doing.

Senator BRANDEGEE. What does the shipper do with the bill of lading ordinarily? Does he go to his local bank and attach the bill of lading to a draft on the consignee at the terminal point?

Mr. FREUND. Yes, sir.

Senator BRANDEGEE. And the two go forward together?

Mr. FREUND. Yes, sir.

Senator BRANDEGEE. So the bank has the opportunity every time, if it wants to, to investigate the genuineness of the bill of lading?

Mr. FREUND. Certainly; the bank can call up the office of the railroad at the point of shipment and find out whether there are goods back of that bill.

Senator BRANDEGEE. Is it not so at present that an agent of a railroad who issues a fraudulent bill, or enters into collusion with a shipper and issues a bill when the goods have not been delivered, is subject to the criminal statutes in all the States?

Mr. FREUND. I should say not all the States. There are some States—I have not in mind which ones of them—but there are some States which have criminal statutes covering this precise matter.

Senator BRANDEGEE. I mean irrespective of defining it precisely; do they not have criminal statutes which in general terms would impose a penalty for a fraud of that kind?

Mr. FREUND. I think not.

Senator BRANDEGEE. There would not be much trouble to have it enacted in those States that did not have it, would there?

Mr. FREUND. No, sir; it could be enacted, but if Congress wants to enact a general bill-of-lading law, or enact any law on the subject of the bill of lading, of course that would be a provision which would reach the very evil that is sought to be corrected.

Senator BRANDEGEE. The thought that lay in my mind was this: You were suggesting that as a deterrent, or a cure for the evil that exists, without passing either of these bills, or anything like them, to bring upon these bills of lading the attribute of commercial paper—applying the law of merchants to them?

Mr. FREUND. Yes.

Senator BRANDEGEE. Now, if they go on in spite of the State statutes, why would a Federal statute have any more deterring effect as a punitive measure against the agent of a railroad company?

MR. FREUND. The first thing I would say in respect of that is the State statutes are not, I think, general, and, in the second place, I think there seems to be greater respect and fear of the Federal statutes.

Senator BRANDEGEE. I have not given it any thought, but it seems to me that the local agent of a railroad company could be proceeded against much more promptly by the prosecuting attorney, or the authority of the local police court, than he could by having a complaint made to the Attorney General or the United States district attorney in different parts of the State to take the matter up before the Federal grand jury.

MR. FREUND. Of course, that would not enter into the question of congressional legislation. It would seem to me that if Congress was to legislate at all, the legislation ought to be confined just to the evil that exists. There is no need of putting a lot of rules on a railroad in order to protect itself, because, as a matter of fact, in 98 per cent of the cases, none of this trouble could arise.

Senator BRANDEGEE. Then your theory is, is it not, that the greater evil is the danger of forgery of a bill of lading?

MR. FREUND. Undoubtedly, I think it has been demonstrated to be true that in all of the big frauds—the Knight-Yancey and others—the things that raise all the trouble have been forgeries. You can not protect against those by statutes.

Senator BRANDEGEE. Now of the 2 per cent, which your information furnishes you, the fact that there are only 2 per cent of bills of lading that are order bills, have you any way of knowing what proportion of those are issued without any goods having been received for them?

MR. FREUND. That I do not know, and I suppose there would be some difficulty in finding that out for the reason suggested by Mr. Colston. I understand that of the 2 per cent of bills of lading that are order bills only, 3 per cent would become the basis of credit or business with the bank.

Senator BRANDEGEE. Three per cent of the 2 per cent. Have you figured out in decimals what percentage that would be of the total amount?

MR. FREUND. No; I have not.

MR. JAMES. Not 2 per cent of the value of the commodity.

MR. FREUND. No; I did not state that.

Senator TOWNSEND. What would be the objection if this law were passed to provide also a penalty against collusion or fraud on the part of the agent and the shipper? Could they not both get together?

MR. FREUND. Certainly.

Senator TOWNSEND. Would that relieve you to some extent from the expense?

MR. FREUND. Well, providing a penalty for collusion would have no effect on the expense, excepting in so far as the penalty offered has a sufficient deterrent to prevent the losses occurring.

Senator TOWNSEND. That would be pretty effectual, do you not think?

MR. FREUND. I should think it would have considerable effect. I think that any law ought to have.

Senator TOWNSEND. You spoke of the expense, and you ought to be allowed more, but to shape a bill under such a law as this, it would,

if enacted into law, be a regulation of commerce and a burden placed upon the railroads, in your judgment, and therefore a legitimate charge for the railroad to make and to take into consideration in fixing its rates, would it not?

Mr. FREUND. I should not want to have it considered as part of the rate. It seems to me it is an absolutely distinct and separate service. It is an insurance. It has nothing to do with the carriage of the goods—the insurance of this as a negotiable paper.

Senator TOWNSEND. Do you not think you could urge this before a court as a reason for raising a rate?

Mr. FREUND. We could urge it as a reason, just as we have urged a great many other things.

Senator TOWNSEND. And you would do it, would you not?

Mr. FREUND. If, in passing your bill, you did not give us a specific right to make the charge, of course.

There being no further questions, Mr. Freund was excused.

STATEMENT OF H. M. ANDREWS, ASSISTANT GENERAL SOLICITOR OF THE ERIE RAILROAD CO., NEW YORK CITY.

Mr. ANDREWS. The company that I represent is one of the companies which Mr. Thom spoke for this morning; that is, as being represented by the advisory committee, but it was deemed such an important matter with regard to these bills that it was desired that I should come here and state the position of our company in the matter.

Senator BRANDEGEE. What is your company?

Mr. ANDREWS. The Erie Railroad Co. I think the two bills that are being considered by the committee at this time are really unnecessary legislation. The call for the legislation comes from a small part of the business handled by railroad companies and from a specified portion of the country, and we do not, as we have heard the legislation and the demand for it before, believe that there is a general call for it. Besides that, as has appeared plainly before you, the losses, if any, which have occurred are very small in number, and so far as I have understood no losses have occurred to our company through failure of the agent to receive the goods specified in the bill of lading; and while it is a fact, or appears to be from the statements that have been made, that there have been some losses occurring, yet we do not know of any upon our lines.

We therefore view the legislation as unnecessary. We do not think it would be efficacious; that is, it would not prevent the evils which are alleged, at least the ones which are cited most prominently before you, or have been ever since this legislation has been considered. This, of course, has been brought out plainly before, and I need not dwell on it except to further state that we do not see how legislation of this character could have any effect upon forgeries, and I do not understand that it is designed to prevent forgeries.

As has been stated by Mr. Colston, we believe that besides being unnecessary and lacking in efficiency, this legislation would be actually harmful, because it would open the door to fraud and collusion and make them easier of accomplishment than they are at the present time by putting the burden upon the railroad company and make it the guarantor of the order bill and tending to lessen the degree of

care now exercised by banks. All that a bank loaning money on an order bill of lading would have to do to be sure of its position in the matter would be simply to satisfy itself that the signature of the agent is genuine, and then its care in the matter ceases from that time on.

For these reasons we think that no legislation on this subject is necessary, and we believe that if legislation is passed, that it ought to be along the line of the Clapp bill rather than the Pomerene bill, because we think that so broad an extension of the character of negotiability to the bill of lading is unwarranted and unwise. If the Clapp bill is passed we think there ought to be some changes in it for our protection.

When the Stevens bill—that was considered in 1902, I believe—was pending, appearances were made before the committee and objections were raised to the bill because it did not give protection to many of the practices of the carriers for the convenience of the shipping public, such as shippers' load and count, and the issue, or making out rather of the bill of lading by the shipper, and at our suggestion—that is, at the suggestion of representatives of the carriers—the provisions which appear in section 23 of the Pomerene bill were added. That has been done in the bill that is now pending in the House—House bill 17935—where the provisions in section 23 of the Pomerene bill have been incorporated in full. We think that change ought to be made in the Clapp bill, and it is my understanding that that has been agreed to. That is one provision that we think ought to be added for our protection and for the protection of the shipping public as well, and for their convenience. We think there ought also to be made a further provision in this bill allowing us to issue either one of two bills of lading—the bill to which attaches ordinary liability now assumed by the carrier, and two, a guarantee bill, for which we should be allowed to make a reasonable charge separate from the freight rate, and our reason for asking it to be made a charge separate is the one that has been stated to you, that it is virtually an insurance proposition, one that we ought to make a reasonable charge for. It is not in any way connected with the transportation obligation, or the obligation attaching to transportation, and further, because if you make it part of the transportation rate, then you are taxing the transportation of other property for the protection of that which is covered by the particular bill.

Then we think there ought to be provisions fixing penalties for the fraudulent collusion between the dishonest agent and the shipper and possibly the banker. We think this is a reasonable request in itself, and think doubtless the committee is already familiar with the recommendation made by the President, and I would like to read what he says in his message of December 6, 1910, with reference to this matter into the record. After calling attention to the fraudulent bills that have been issued in the cotton cases, and the negotiations which have been carried on with foreign bankers, the president said:

For the protection of our own people and the preservation of our credit in foreign trade, I would urge upon Congress the immediate enactment of a law under which one who, in good faith, advances money or credit upon a bill of lading issued by a common carrier upon an interstate or foreign shipment can hold the carrier liable for the value of the goods described in the bill at the valuation specified in the bill, at least to the extent of the advances made in reliance upon it. Such liability exists under the laws of many of the States. I see no objection to permitting two classes of

bills of lading to be issued: (1) Those under which a carrier shall be absolutely liable, as above suggested, and (2) those with respect to which the carrier shall assume no liability except for the goods actually delivered to the agent issuing the bill. The carrier might be permitted to make a small separate specific charge in addition to the rate of transportation for such guaranteed bill, as an insurance premium against loss from the added risk, thus removing the principal objection which I understand is made by the railroad companies to the imposition of the liability suggested, viz, that the ordinary transportation rate would not compensate them for the liability assumed by the absolute guaranty of the accuracy of the bills of lading.

I further recommend that a punishment of fine and imprisonment be imposed upon railroad agents and shippers for fraud or misrepresentation in connection with the issue of bills of lading issued upon interstate and foreign shipments.

Now, one word with reference to the matter of fines and penalties, on the line of a suggestion made by Senator Brandegee, I believe—and that is that it is believed that the effect of a penal statute—a Federal penal statute—is greater than that of the State statute. There seems to be a greater respect for it, and in addition to that, I believe the punishment of criminals by a United States court is more prompt because there is a tendency to remove the trial from local conditions, from local influences, so that punishment is surer, I believe, and more prompt in the United States courts for that reason. We have found it so. I believe that the penalties prescribed in the Pomerene bill are excessive. I think the measure would meet with greater success if they were made smaller. It would be easier, I believe, to secure a conviction for a misdemeanor for which a fine of a moderate amount—such as \$500, and imprisonment for a year—than where the fine is \$5,000, with five years' imprisonment.

Mr. JAMES. Not to exceed \$5,000. It is optional.

Mr. ANDREWS. That is all I have to say, gentlemen.

Senator BRANDEGEE. It has been testified here by different witnesses in some instances a shipper is obliged to take whatever sort of bill of lading the railroad company has a mind to tender him, and in other cases that the shippers make out their own bills of lading. Is there any uniform custom with regard to that?

Mr. ANDREWS. There is a uniform bill of lading that is approved by the Interstate Commerce Commission.

Senator BRANDEGEE. As to who makes it out, I mean, in the beginning.

Mr. ANDREWS. I do not know that there is any uniform prescribed custom. It depends, I think, on the condition of the shipper. If the shipper makes shipments in large volume, so that it is a matter of convenience both to himself and the railroad company for him to make out the formal part of the bill of lading, he makes it out, handing it over to the railroad company for signature. I believe that is the custom, but further than that I know of no regulation.

Senator BRANDEGEE. As it lay in my mind, somebody testified here that a shipper sent his goods down by the driver, in many cases, and the driver had to take whatever bill of lading the railroad wanted to tender him or nothing. Other people say that the bills of lading, or the forms, are taken out of the office and carried home and made out and sent down by the shipper and the railroad agent just signs them. I did not know what the custom was, or whether there was any uniform custom about it.

Mr. ANDREWS. I think that varies with the different shippers, and I think there is no objection, of course, where a shipper, even though he be a small shipper, brings a shipment of property, which he has

already described in his bill of lading, and hands it to the agent. The agent takes the shipment, and I think that saves the agent very much work and he is glad to do it; but as to a uniform custom, I do not know of any.

Mr. JAMES. It makes some difference in the commodity, frequently. In the primary grain markets the railroads give a mere shipping ticket that is afterwards exchanged for an order bill of lading which the carrier may deliver the next day or some other day. Frequently in the ordinary package shipment the authorities furnish to the shipper three documents. They are exactly alike, except there is a letter "d" left out of the word "received." One is called the shipping order. It says "Receive." The next is a memorandum, which is the office copy, which is "received," and the bill of lading itself is received and the shipper has his carbon copy and gives them out; two of them are handed to the railroad. The shipping order says "Received." In other words, it is an order to the carrier to receive these things. He signs it. The railroad company hands back to the shipper the third copy. He has a memorandum, which is his office copy, and the original bill of lading, but in cases, as I understand, of the primary mark on large shipments of grain, it is done by a shipping ticket. Then the railroad itself makes out the ordinary bill of lading and it is exchanged for the shipping ticket.

The CHAIRMAN. I think you misunderstood the testimony. I went into it at some length. The testimony is practically all, I think, one way, that the shippers were not obliged to take such a shipping bill as the carrier suggested, but on the contrary would not take one unless it did conform to the facts, because it would discredit the use of the bill.

Senator BRANDEGEE. I was not sure about it. That is the way it lay in my mind.

Senator POMERENE. I was engaged in the Senate and did not hear the earlier part of your statement, and will only ask one or two questions. What railroad system do you represent?

Mr. ANDREWS. The Erie Railroad Co.

Senator POMERENE. Your shippers have no voice in the selection of your freight agents, do they?

Mr. ANDREWS. Not as far as I know.

Senator POMERENE. Why, then, should they guarantee the honesty of your employees?

Mr. ANDREWS. We do not ask them to guarantee the honesty of our employees.

Senator POMERENE. Well, you are practically requiring that when you ask that there be something additional paid as a guaranty of the bill of lading.

Mr. ANDREWS. No; we ask not for that; we ask for payment for becoming guarantors, in other words, of negotiable paper, something which we think is not a part of the duties which we perform as transportation agents.

Senator POMERENE. When you receive a consignment of goods at one of your freight depots or in your yard you contract for the safe transportation of those goods. Now, I confess I do not see why you should not be required to guarantee the bill of lading or receipt which you give for those goods, and if there is any distinction between the position of the freight agent and the position of any employee of a

department or other store who receives or delivers goods I would like to have it pointed out.

Mr. ANDREWS. In compelling all railroad companies through any agent at any local point, to issue a negotiable instrument without regard to the amount, we think the railroad company is assuming a duty which was never intended that it should have. It becomes a guarantor of an agent's honesty in issuing a negotiable instrument of any amount sufficient to bankrupt the company, if need be, and, as has been pointed out, it is not so apparent on the road I represent as it is on some of the western and southern lines. It is a practical impossibility for the railroad company to get agents of a character that will warrant it in assuming such a responsibility. They are not to be had—not for the amount of money that any company is able to pay its large number of agents.

Senator POMERENE. Do you think the railroad companies have any serious difficulties in getting honest employees to represent them as freight agents?

Mr. ANDREWS. I know we have a great difficulty; yes, sir. I know that we have difficulty, and I know other companies that have greater difficulty than we.

Senator POMERENE. Every other business man will make a mistake occasionally in employing his men to aid him in carrying on his business. Is there any greater number proportionately in the railroad business than there is in the private business of the manufacturer or merchant?

Mr. ANDREWS. I do not know that there is, but there is this vital difference; for instance, on our line there are 900 miles and more between New York and Chicago, running through localities in which one agent must be selected in each locality. The ordinary business man, and the bank with which we are compared here in this instance with reference to this legislation, has the opportunity and the bank has the opportunity of knowing locally the agents they hire. They are confined ordinarily, or in a great many cases, within four walls or within the inclosure surrounding the plant, but we have to deal with conditions in hundreds of different towns, taking one man from a town whom we can not investigate so well as the ordinary business man in the banking business.

Senator POMERENE. Does not your office force give the same intelligent investigation to the employment of these freight agents that the average business man would give?

Mr. ANDREWS. It attempts to, but it has greater difficulties to deal with.

Senator POMERENE. And you have your inspectors and private police force along your entire road all the way?

Mr. ANDREWS. Yes, but they are not dealing with our agents—our police force.

Senator POMERENE. They are dealing with everything, are they not, that concerns the business of the company?

Mr. ANDREWS. As far as their line of duty goes, yes.

Senator POMERENE. Now what per cent of your shipments have been received which have resulted in frauds upon the railroad company, for instance?

Mr. ANDREWS. Oh, I do not know. I know of no instance in which the property covered, or alleged to be covered, by bills of lading has not been received.

Senator POMERENE. Are you able to state now what amount of losses your company has sustained by reason of the issuance of fraudulent bills of lading?

Mr. ANDREWS. No, sir; that I do not know.

Senator POMERENE. Are you able to state what percentage you would increase your charges if this additional burden were placed upon the railroad companies?

Mr. ANDREWS. No, sir; I think that is a matter for our transportation department to deal with after a canvass of the situation.

Senator POMERENE. Are they able to give any information on the subject?

Mr. ANDREWS. I think they would be. I think they would be. They arrive intelligently at the rates to be fixed for the service rendered, and I think they could accomplish this. I believe that if a charge is to be made it ought to be stated to be a reasonable charge, fixed by the railroad company in the first instance, and subject, as in cases of charges for other services, to the approval of the Interstate Commerce Commission.

Senator POMERENE. It looks to me as if your objections along that score were purely speculative. There is mighty little danger to the shipping company if they are reasonably careful in selecting their employees; and as they employ them, and as the shippers have nothing whatever to do with it, I fail to understand why the shippers should be guaranteeing your waybills or bills of lading.

Mr. ANDREWS. Naturally, Senator, it has to be speculative in a measure, because it is dealing simply with a burden that is to be assumed in the future and necessarily has to be speculative to a certain degree.

Senator POMERENE. But you seem to be speaking out of the abundance of your experience when you come here and ask Congress to permit you to make some extra charge.

Mr. ANDREWS. We ask simply to be allowed to make a reasonable charge for an additional burden that is being placed upon us, and if that be an unreasonable request then let it stand. I do not believe it is an unreasonable request.

There being no further questions, Mr. Andrews was thereupon excused.

STATEMENT OF CHARLES F. DROSTE, NEW YORK, MERCHANT AND REPRESENTING THE NEW YORK MERCANTILE EXCHANGE, AND ALSO MEMBER OF THE MERCHANTS' ASSOCIATION OF NEW YORK.

Mr. DROSTE. Mr. Chairman and gentlemen, representing these organizations that I have referred to, and also as an individual merchant who has had experience in the matter of bills of lading, I advocate and beg this committee and the Senate to strengthen the validity and the integrity of a railroad receipt or bill of lading, or whatever it may be called. In effect it is a railroad receipt for goods received.

The argument has been made here that there is no cause, or no reason, for the demand such as we come before you now to present. As a matter of fact, this demand has arisen only because there is a reason, because there has been such gross irregularities in the issuing

of bills of lading that we merchants finally had to appeal to you for protection and redress. I will show to you later my grounds for that assertion.

The first argument made to-day was that if this act became a law it would practically stop the business of the country; that great expense would be involved; that the business would move slowly and could not proceed because bills of lading would have to be made out by the railroads.

To answer that argument: I can not see at all why it should in any sense delay the business of the country. Bills of lading are to-day made out by the individual, by the merchants, and attested to by the railroad agents. The railroad agent attests to the correctness of that bill of lading from a receipt which is attached to that which the merchants send to him—his receipt for goods received, receipted by his own agent at his own wharf, and from that the authorized agent issues this bill of lading. The fact that the merchant fills out that bill of lading simply assists the railroad. He is the clerk of the railroad and nothing more. He does the work for the railroad and makes no charge for it. The business is not at all impeded; it is accelerated by that action.

The next very important charge that has been made throughout this entire argument on the part of the railroads is that all these irregularities in bills of lading, in the sending of bills of lading where no goods have been received, have been because of collusion between the shipper and the agent. I want it understood now that I do not refer in any sense to the fraudulent or forged bills of lading, because I think they have nothing to do with this case at all. We are not discussing that, but purely the validity of a legitimate bill of lading as issued by the railroad company. The collusion that is said to exist between the agent and the shipper in the cases where no goods have been received exists only in the minds of the attorneys of the railroads. In actual experience, such as I have had, there has never been any such collusion between the shipper and the agent, except for the benefit of the railroad. The agent himself received no compensation for what he did, except that he drew business to his railroad and possibly indirectly made himself more valuable to that road.

A great deal has been said about the illiteracy of the railroad people's agents. Now, to my mind illiteracy does not carry with it dishonesty. A man may be unable to write his name very flowingly and yet be very honest. I believe the majority of the small agents throughout the country are decent, honest citizens and can not be bribed to anything at all, except to something that they feel the railroad itself will wink at and through that medium draw business to them and ultimately advance the fortunes of that agent. That is the incentive. The incentive for the agent to do wrong is not that he receives direct compensation for the wrong he does, but simply indirect. The main benefit of what he does goes to the railroad. The illiteracy of these men and their incompetency, etc., has been mentioned frequently. I will come to my experience.

My experience is with the Wabash Co., at the city of Chicago. The bill of lading which I hold in my hand is signed by H. E. Northrop, the agent of the Wabash Railroad, and is in a very flowing, beautiful hand—not an illiterate hand. It is a receipt for 300 tubs of butter shipped to the order of Emerson Marlow & Co., notify Droste

& Snyder, New York City. The date of it is Chicago, October 22, 1907. There were two of those bills of lading presented in my office, each for 300 tubs, each bearing the car numbers and bearing the imprint also "freight prepaid," and properly signed, and a draft for \$10,200 attached to those two bills of lading. We paid the draft on October 25. I think it was October 26 or October 27 that this concern suddenly became insolvent. It was during the time of the panic. One of the cars consigned to us in this manner arrived in New York and was properly sold in due course. The other car did not arrive. I started a tracer through the New York agent for this car, and on October 29 I received the following message:

DROSTE & SNYDER, *New York*:

You are hereby notified to refuse payment of draft accompanying American Refrigerator Transit Co., lading No. 664, dated the 23d, issued to order Emerson Marlow & Co. Notify Droste & Snyder, covering 300 tubs of butter, as goods will never reach you.

Then next we received——

Senator BRANDEGEE. That is signed by whom?

Mr. DROSTE. By Northrop, the same agent. I then telegraphed Northrop at the Royal Insurance Building, Chicago, Ill:

Draft was paid on the 25th. Where are the goods? How are they detained? Give full particulars.

I received no answer of any kind or description to that telegram. It took me until November 13 to ascertain that something was wrong, and then I ascertained that the goods had not been shipped, but I never got anything more from Mr. Northrop nor from the Wabash Railroad Co.

Numerous correspondence passed between us as late as March 7, 1908. I made frequent demands on the railroad company for compensation for those 300 tubs of butter but got no satisfaction, and finally entered suit in New York City against the Wabash Co. We sued in the United States court. Their response was, under affidavit, stating the fact that both Mr. Snyder, my partner, and Mr. Droste, were residents of the city of New York. I should say that we sued under the New York State law, in the New York State court, originally. And the answer was that we were both residents of the city of New York. That was under oath, and consequently the case belonged to the United States court. Of course they expected to be protected under the United States court decisions, and not under the New York State decisions, and the judge transferred it to the United States court. We, of course, appeared and gave our testimony to show that I personally had lived in New Jersey for 23 years and Mr. Snyder had lived there for 10 years—notwithstanding their affidavits that we were both residents of the city of New York. The case was again taken out of that court and retransferred to the Supreme Court of the State of New York. It was tried, and here is the printed testimony. The jury was out 10 minutes, and awarded me \$5,100, approximately—I am not sure as to just exactly the amount. The railroad company within that four weeks offered to settle the matter for \$4,000, which I declined, and the result was that they appealed to the court of appeals in Albany. That is where the case is now, and this [indicating] is the testimony in the case.

That was my experience, with not an illiterate agent but with an agent of very high standing, a relative of the Goulds, who held this

position and had done this thing not once but a thousand times. There were three bills of lading of similar character—two, rather, another one that has never been filed, and is now in the courts, consigned to Philadelphia. This gentleman retained his position for quite a while after this and later was transferred to some prominent position on the Long Island Railroad, I believe.

That was my experience with the Wabash. My other experience was with the Chicago & North Western, of precisely similar character. The agent at either Blue Earth or Fairmount, Minn., signed for a car-load of butter and eggs, giving the number of packages. The shipper of this stock became embarrassed in the meantime, and wishing to protect us as far as he could, the bill of lading having gone out and having been paid by us—he knew that—he ordered the agent to close the doors of the car and shove it along. When we got it we found \$1,400 less of value in the packages than the bill of lading signified. I should say that at first it was in the hands of the traffic department and later in the hands of the legal department. The legal department actually took the stand that, the law of Minnesota being very much like the United States law, we could not collect because they were not responsible. We did not attempt to fight it legally at all, but took the business away from them, and in four or five weeks they paid the full amount of that claim.

There was exactly a similar case of an agent receiving goods, or rather receipting for goods that he had not yet received. The object of doing that in Minnesota was exactly the same as it was in Chicago. It was to concentrate the great volume of business to that road as in competition with the Chicago, Milwaukee & St. Paul at the Minnesota points and various other roads at the Chicago points, the incentive being not to benefit the agent or he to benefit himself by doing this, but to benefit the road for which he was working, and that is why we, as receivers of goods, feel that we need this protection from the United States in making a bill and in protecting the integrity of a railroad receipt.

There has been a great deal said here about the light percentage of losses accruing out of this sort of false bills of lading. If the percentage of losses is so slight as that why should there be any great charge attached to the certifying or safeguarding of a bill of lading? Under the loose conditions under which we are operating to-day, when nobody is responsible or liable, apparently, the losses, the railroad people say, are little or nothing. Then what is the harm of protecting it? You safeguard business to a great extent and you safeguard the interests of thousands of small dealers and operators throughout the great West, who find it necessary to use these bills of lading with which to finance their business.

My business is a very large one in the two lines of butter and eggs, running into many millions annually. Out of all the business I handle I do not believe there is less than 90 per cent that is handled on sight drafts against these bills of lading. These bills of lading are not against order bills of lading, but many of them—a great majority of them—are against straight bills. I accept the bill of lading and pay sight drafts for the full value of the property. Consequently, as a merchant, I am very anxious that something of this kind should be done to strengthen the value of the bill of lading and the sanctity of it and the integrity of it. It purports now to be something, but

it is nothing, according to these railroad people. They say, "A bill of lading signed by one of our agents is really nothing; we are not responsible"—it does not mean what it says. "Received 300 tubs of butter" does not mean that at all. It may mean nothing. If that is the case the business of the country, to a very great extent, must stop. If, as merchants, we are to be informed that that is the case, and the United States Government says that is the case, then we have no redress but to say that we can not advance money against the paper of that kind, and if that is the case the small man will have but small opportunity in the West to do business, because the great majority of the active trade people in my line of goods are men of very small means. The hazards are many and very few of them accumulate any considerable capital.

The statement was made here that the dealings were only in order bills of lading as a basis of credit. That is not true. My friend made that statement. I think he was not aware of the fact that the basis of credit of our business, which amounts to hundreds of millions annually, is not the order bills of lading; it is on straight consignments against which we accept drafts.

Now, in regard to this short bill, as it is called, I believe, I have not consulted the organization to which I belong to receive their authority for speaking for them, but in section 4 of this bill it says:

That every carrier who, himself, or by his officer, agent, or servant, authorized to issue bills of lading, shall issue, etc.

I believe it would be very important that if this bill becomes a law that the authorization of such a person should become a known fact to the local banker and ourselves, or whoever it may be. If we impart to this bill of lading and to this agent increased authority and say, "the authorized agent" you must also have a certificate of authorization which shall be prominently displayed.

Senator POMERENE. Which section are you referring to?

Mr. DROSTE. Section 4 of the short bill. Unless such authorization is displayed in some prominent place, or posted with a Government official, there can be no guarantee that the railroad company may not employ somebody else to do the very thing that we want them prevented from doing, and claim that the man was not authorized. That might happen. We do not want to increase our troubles. We do not want to increase our legal fees. We want to decrease them if possible.

Section 7 reads to me like a very important section:

That any alteration, addition, or erasure in a bill of lading after its issue without authority from the carrier issuing the same, either in writing or noted on the bill of lading, shall be void, but such bill of lading shall be enforceable according to its original tenor.

Section 6 is as follows:

That no carrier shall be liable under the provisions of this act where the property is replevined, or removed from the possession of the carrier by other legal process, or has been lawfully sold to satisfy the carrier's lien, or in case of sale or disposition of perishable, hazardous, or unclaimed goods, in accordance with law or the terms of the bill of lading.

It makes no provision for the consignee or the holder of the document to be notified of such procedure against their property. There may be a replevin, and yet the railroad is not compelled under this

act to notify the party holding the bill of lading when they might desire to become a party in the action against the party replevying.

In the proviso certain provisions are made under certain conditions, particularly in the matter of the shipper's load and count. It appears to me that that clause there should have your very careful consideration. It is as follows:

Provided, That where an order or a straight bill of lading is issued for property billed "shipper's load and count," indicating that the goods were loaded by the shipper and the description of them made by him; and if such statement be true the carrier shall not be liable for the nonreceipt or by the misdescription of the goods described in the bill, in which event the estoppel and liability above provided shall not attach.

But the improper loading is the particular point I wish to make. The road or the carrier should exempt under a shipper's load-and-count bill of lading for the improper loading of a car. There are thousands of cars loaded all over the country by the shippers. It saves the carrier many hundreds of thousands of dollars annually, because the shipper is doing the labor of loading its cars. If the carrier is to evade the responsibility on every shipper's load-and-count car because the load has shifted or because it has been damaged in the rough handling of the property, then the shipper's load-and-count bill of lading will be utterly worthless.

Senator BRANDEGEE. That is what the act says. It says the improper loading, not the shifting.

Mr. DROSTE. Improper loading results in shifting—in jamming the cars, as those cars are jammed about. However carefully a car may be loaded or however correctly it may be loaded, it frequently arrives in bad condition.

Senator BRANDEGEE. That may be true; but suppose the shipper should load the car and improperly load it, why should the railroad be liable?

Mr. DROSTE. If they can prove that.

Senator BRANDEGEE. That is what this bill means.

Mr. DROSTE. I believe they should see that the car is properly loaded before they sign that bill of lading. They should perform that service. If they are willing to accept the service of the shipper in loading this car they should at least undertake a supervision of the loading of the car and see that it is properly loaded before signing the bill. That bill of lading is the only evidence that I have that the work has been properly done. The shipper furnishes all the labor and all that is asked of the railroad is supervision. If they do not give it that supervision, then at least let them assume the risk.

Mr. BOND. Having paid the shipper in the lower rate, though.

Senator BRANDEGEE. In the case of those shipments of butter, the carload of butter, you say the bill of lading called for 300 tubs of butter?

Mr. DROSTE. Yes, sir.

Senator BRANDEGEE. In two carloads?

Mr. DROSTE. In two carloads.

Senator BRANDEGEE. And one carload arrived?

Mr. DROSTE. With 300 tubs of butter in it.

Senator BRANDEGEE. I did not understand. I thought it called for 600 tubs?

Mr. DROSTE. It called for 300 tubs in each car.

Senator BRANDEGEE. And the bill of lading was for 600 tubs of butter?

Mr. DROSTE. For 600 for the two cars.

Senator BRANDEGEE. And you think the local agent of the railroad issued the fraudulent bill of lading, never having received but 300 tubs—

Mr. DROSTE. It has been the common practice.

Senator BRANDEGEE. Let me finish my question—issued that for the purpose of securing the shipment of these 300 tubs of butter in competition with some other road, and for no other purpose, and invited a lawsuit for \$5,000 to get the shipment of these 300 tubs of butter?

Mr. DROSTE. It is the practice of the railroad agents, particularly with strongly competitive lines, and with large shippers especially. It has been going on for years. They have signed bills of lading days and weeks before the cars were actually loaded, expecting the shipper to take the bills of lading to the bank, and the bank in turn forwarding them to us as receivers and we paying the draft upon them.

Senator BRANDEGEE. I understand that, but is it your theory that the railroad agent expected that the other 300 tubs of butter would be tendered to him?

Mr. DROSTE. It was an agreement between the shipper and himself that all of his business should go there for this accommodation. It was not only 600 tubs to-day; it was 900—3, 4, 5, or 6 carloads every day on which this business was done. There never was any trouble until this failure came, but there were thousands of cases throughout the country.

The measure of damage to which this business can be done can never be estimated by you gentlemen, and I think the railroad people know that. So long as the shipper practices this, and the agent conniving at it—as long as the shipper does not fail, it never comes to law, because in the course of time he feels that there will ultimately come a period when he can go no further, and he comes to law, and the losses occur.

Senator BRANDEGEE. I think I see what you have in mind now. You did not so state it before. I understand you to say that the railroad had an agreement by which the skipper was to give all his shipments to this railroad, and the railroad agent issued in advance a receipt for the shipment described in the bill of lading?

Mr. DROSTE. We never got the agent on the stand at all, but the shipper admits that.

Senator BRANDEGEE. Admits it in the proof in this suit?

Mr. DROSTE. Yes, sir, and it is a well known practice which, however, I will say, to the credit of the railroad, is lessening ever since this case came up. I have followed this case up, and I am going to continue to do it.

Senator BRANDEGEE. You do not understand that that is a case of fraud on the part of the railroad agent?

Mr. DROSTE. Not at all.

Senator BRANDEGEE. But simply that the agent supposed that he was going to get the shipment that he receipted for but it did not turn up?

MR. DROSTE. In all my experience with the railroads I know of no case of actual fraud and collusion between the railroad and the agent and the shipper. Wherever it has been done it has been done for the benefit and for the advantage of the railroad, purely for the sake of getting business. I do not know of any case where the agent himself has directly profited by any such transaction as that. I believe if he had profited, and it could be proven, he probably could be sent to jail, but the other business is something that they do for the purpose of increasing the business. They are earnestly intent upon increasing business.

Our position is, and what we maintain is, we want to prevent this kind of competition. Furthermore, I am a shipper myself from the State of Iowa. I also want to protect that business as against the dishonest shipper. This enables the dishonest shipper to continue in business. The railroads assist in financing him. The honest shippers will not stoop to a thing of that kind. He is injured by that operation. There have been numerous parties in the west who have done this. You have had a great many cases cited here, one and all of a sort of crooked class, which were not discovered until this case came to light. There were competitors who were unwilling to do that sort of thing who could not compete with them, and the reason for that was that these particular people got enormous business and made it very valuable to the railroads until the crash came. In my case they did not want to lose my business. The other did not compete.

Senator BRANDEGEE. Why do you think that that practice on the part of the agent of the railroad would be less under the bill proposed than it is now? If he is not deterred at present by threat of criminal suit, why should you think so?

MR. DROSTE. The agent will never do anything of that kind unless some officer of the railroad gives him the quiet wink that he might do it, to draw a lot of business. If he knows that he is going to gain by it in no way, either in advancement in position or any other way, there would be no incentive for him to do it.

Senator BRANDEGEE. Your theory is that if the railroad was made liable in damages he would stop doing it?

MR. DROSTE. Every one of these railroad companies go to their agent and say to them, "Under the penalty of your losing your job, you must not sign for things that you have not received or are absolutely certain you have received."

Senator BRANDEGEE. Do you think the railroad officials now encourage the agents to issue bills of lading for goods that they have not received?

MR. DROSTE. Not since this matter has been stirred up. I think there is very much less of it. I do not know that there is any of it at the present time.

Senator BRANDEGEE. And you think it is due to the agitation with respect to this legislation?

MR. DROSTE. Undoubtedly; people have become awakened to this. This practice was growing. These gentlemen lay the Albany trouble to the fact that the New York law existed, but the New York law existed in that shape for 50 years. That is not the case. There has been a lessening of this because of the impending legislation. They have been found out, and they find that it does not work, and

also the interstate-commerce supervision that we are having at the present time makes that sort of rebating—and that is all it is—dangerous. It is purely another case of rebating to get business, and the railroad people begin to realize that and are doing less of it.

Senator BRANDEGEE. In that butter shipment, the bill of lading specified the numbers of the two different cars, did it?

Mr. DROSTE. Yes, sir; they were all perfectly straight bills of lading, showing exactly what each car was supposed to represent. If this man had not had his bank account closed and had been thrown into bankruptcy, as he was, undoubtedly that car would have been filled in the course of a day or two, and I would have received my butter; but the collapse came, and he could not get the butter into the car. It was signed two days before there was any attempt to get any of it in the car, and put through. One car he filled, and it moved on its way. The other car was not. It never had anything in it.

Senator TOWNSEND. Did you take any action against the shipper?

Mr. DROSTE. The shipper was bankrupt. It was an order bill of lading, and we held the railroad.

Senator TOWNSEND. I had forgotten your suggestion with regard to that. Where a shipper loads his car, does he get a lower rate?

Mr. DROSTE. No, sir.

Senator TOWNSEND. What is his object in loading it, then?

Mr. DROSTE. Convenience, pure and simple. At many of these plants throughout Minnesota and Iowa and all through the West, there are railroad sidings; they have one or two or three cars put alongside the warehouse, and they load those cars at their convenience. They do all the work themselves—loading those cars—and when the car is ready to go forward they notify the railroad. Now, it is customary for the railroad to send their representative there to tally out that car and see whether it contains what the receipt calls for and to see whether it is properly loaded. The work has all been performed by them. Many of these sidings are half or three-quarters of a mile, and some of them a mile away from the receiving depot. It is a great convenience to the shipper to have that accommodation, and a great saving to the railroad to have it. I think the railroad people will agree with me that at many stations they could not properly take care of the freight unless these accommodations were offered them by different shippers.

Senator TOWNSEND. You say a railroad agent or inspector comes along and looks the car over?

Mr. DROSTE. He should do that.

Senator TOWNSEND. But does he?

Mr. DROSTE. There are many cases where he does. I think a railroad agent, where he finds that the shipper will not accept shipper's load and count bills of lading, and where the agents of the railroad have not the utmost faith in the integrity of that shipper, will go and check that car before signing the bill of lading. Naturally the railroads surround their business with every safeguard that a merchant does always. They are very particular. They do all they can. They take, like the merchants do, many risks.

Now, they are in this novel position, that for the risks they take they do not want to assume the responsibility.

Senator TOWNSEND. Do you want to deny the right of the railroads to be protected against the shipper's count?

MR. DROSTE. I think that should be their responsibility, if they sign that bill of lading.

Senator TOWNSEND. Even though it is put there for your accommodation——

MR. DROSTE. And for their profit.

Senator TOWNSEND. And the car loaded?

MR. DROSTE. We do all the work. We load the car and charge them nothing at all for that.

Senator TOWNSEND. But you are not doing business for your health. You are doing it for profit also, are you not?

MR. DROSTE. That is our convenience. The carload rate is the lower rate.

Senator TOWNSEND. But your rate is the same as any other coaload rate, if the other was loaded by the railroad instead of yourself?

MR. DROSTE. Just the same. There is no distinction between that loaded by the shipper and that loaded by me.

MR. COLSTON. The fact is all carload rates are carload rates. More than a carload rate ordinary contemplates loading by the company but less contemplates loading by the shipper.

MR. DROSTE. That is not my experience. We load a great many cars where we send simply to the depot and they are loaded by the railroad from New York. We can not load it from New York. In New York we are obliged to put the goods on the wharf and the railroad loads them.

MR. COLSTON. And you are charged lighterage.

MR. DROSTE. That usually comes in the rate. They do not charge it to Jersey. We are not charged lighterage there.

Senator TOWNSEND. The thing I am interested in is that part of your argument which seemed to carry the impression that where the shipper for his own convenience—for I take it if it was not he would not do it; if it was not for his convenience he would let somebody else load it—whether the railroad ought to be held to the account? The shipper makes on the goods put into that car. If the car was loaded full; it would seem to me almost impossible for an inspector to determine exactly what was in that car. He could get a general view of it and see whether it was so and so, but the question is whether the carrier ought to be held responsible under those circumstances.

MR. DROSTE. I do not think he should on the number. What I referred to there was particularly the loading. The claim would be made in case a car arrived in damaged condition, that it was improperly loaded. The count itself can be accepted by the railroad on affidavit. If on the arrival of the car it is found two or three or five packages short we enter a claim for shortage. The claim takes its course and ends with the shipper, and as a rule if the shipper will make affidavit that he has loaded the full amount specified in the bill of lading the railroad will accept that affidavit and that proof, providing in the course of the car coming along it is proved that the seal was broken somewhere and there was a possibility of theft.

That is the history of this subject. If there has been some question that in the carriage along the route the car has been opened or something has happened and the railroads are aware of that condition they will accept, as a rule, the shipper's affidavit that he loaded a certain number of packages in there, but the simple loading of the car, the proper loading of the car, is quite another question.

Then there comes in the question of rough handling, particularly in breakable goods that I deal in. They are handled the same as pig iron. If a car comes in broken on shipper's load-and-count bill it would invariably result in the claim that that car was not properly loaded. It is that that I wish to protect the shipper against.

Senator POMERENE. I would like to suggest that you have in your correspondence the bill of lading in connection with that shipment. Have you any objections to inserting it in the record?

Mr. DROSTE. It is a court record. It is still in court.

Senator POMERENE. I mean the copy that you have with you.

Mr. DROSTE. Oh, yes, sir.

The bill of lading referred to is as follows:

[N. Y. Supreme Court. Trial term. Part 14. Plaintiff's Exhibit No. —. P. B. Sheridan, stenographer.]

Shippers will secure quick time and be assured attention in transit by ordering their freight via regular A. R. T. Co. routes as shown on back of this B. L. Freight routed by other lines will be subject to transfer at junction points.

Form 26.—Perishable freight.—The Wabash Railroad Company.—Special bill of lading.—Shipment in American Refrigerator Transit Co.'s cars.

CHICAGO, October 23, 1907.

Received by the Wabash Railroad Company from Emerson Marlow & Company the following packages, marked and numbered as per margin to be transported by the said the Wabash Railroad Company and the forwarding lines with which it connects, until the same shall have reached the point named in the margin of this contract, on the following express terms and conditions, to wit:

First. The Wabash Railroad Company and connecting lines shall not be liable for any damage occasioned by improper packing, or from the leakage or breakage of packages, or for any loss or damage occasioned by wet, dirt, fire, or loss of weight, or for any loss, damage, or delay of goods occasioned by the breaking down of bridges, or from the failure or breaking of machinery or cars, or from mob violence, strikes upon railroads or among railroad employees, or from freshets, storms, or other providential causes; and in no event shall the Wabash Railroad Company or any connecting line be liable for the safe or proper carriage of said goods beyond its own road.

Second. It being known by the parties hereto that the goods received and to be transported under this bill of lading are in their nature perishable and liable to injury from unavoidable delays, as well as to the unavoidable injury while being loaded, unloaded, and transported, it is therefore agreed that said railroad company and its connecting lines shall not be required to forward and deliver the same at their destination within any specified time or to give them a preference over other freights or the goods of other parties, and that neither said railroad company nor its connecting lines shall be responsible for any damage occasioned from heat or cold or from decay or deterioration in value or quality while awaiting shipment or while in the cars of said railroad company or after the goods shall have been removed from the cars of said railroad company and placed in the cars, boats, or other vehicles of any other person or company to be forwarded to their destination or for any injury or damage from breakage while being loaded, unloaded, or transported.

Third. All goods received under this contract will be subject to correction of weight and classification, also to all necessary cooperage at the owner's cost, and said railroad company shall not be held accountable for any damage to or deficiency in packages after the same shall have been receipted for, in good order, by consignees or their agents or the next succeeding carrier.

Fourth. Consignees are to pay freight and charges upon goods, in lots or parts of lots, as they are delivered to them; but in case any goods are delivered without payment of charges then said railroad company shall have a lien upon and may retain all other goods of the same shipper, consignee, or owner in satisfaction of such arrearages, whether covered by this or any other bill of lading.

Fifth. It is further stipulated and agreed that no claim for loss or damages which may accrue to the owner of the goods herein named shall be allowed or paid by this railroad company or any connecting line unless such claim shall be made by the owner or his agent, in writing, verified by affidavits, setting forth the nature and extent of such loss or damage, and so verified, delivered, or forwarded by mail to the freight

claim agent of this railroad company, at St. Louis, Missouri, within five days after such goods arrive at their destination.

Sixth. It is further agreed, in consideration of the reduced rate at which these goods are carried, that any claim for loss or damage accruing to the owner of said goods shall be computed on the basis of the value or cost of said goods at the time and place of shipment, and that the railroad company or carrier paying such claims shall have the full benefit of any insurance which may have been effected upon or on account of said goods.

Seventh. It is further agreed that the goods herein named are subject to any transfer charge that may result from car being loaded more 4,000 pounds above its marked capacity, said transfer charge to be added to the freight charges and collected from consignee.

Eighth. After the arrival of the goods herein named, at the station or depot of delivery, said railroad company and connecting lines shall thereafter be held liable as warehousemen only. Property in carload lots not unloaded by the consignee within 48 hours after arrival shall be held in storage in the car at the owner's risk, and a charge of \$1 per day for each day and fraction thereof, after the expiration of said 48 hours, made for such storage and car service, which charge, together with freight charges, shall be a lien upon said property; or the same may, at the option of the carrier, be unloaded and otherwise stored at the owner's risk, subject to regular storage charges, which, together with freight charges, shall be a lien upon said property. Property in less than carload lots, not removed by the consignee within 48 hours after arrival, shall be held in storage in the car, warehouse, depot, or place of delivery, or otherwise stored, at the owner's risk, and subject to storage charges therefore at current rates, which charges, together with freight charges, shall be a lien on said property.

Ninth. It is further agreed that unless this bill of lading shall be delivered to the agent of said railroad company or its connecting lines at the destination of said goods, on or before their arrival at said point, then said railroad company or such connecting line is hereby authorized to deliver said goods to the consignee, and after said delivery there shall be no longer any responsibility for or on account of this bill of lading, or for or on account of any indorsement, assignment, or transfer thereof.

Tenth. It is mutually agreed that this bill of lading is not negotiable unless the word "order" without any condition or limitation, other than the name of the party to be notified of the arrival of the property at its destination, is written immediately before or after the name of the party to whose order the property is consigned, and that the word "order" is so written this bill of lading shall be negotiable, and must be surrendered before the delivery of the property.

NOTICE.—In accepting this contract the shipper, or other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations and conditions.

In witness whereof the agent has affirmed to — bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

This contract to be presented without alteration or erasure.

Marks, consignee, and destination.	Description of articles.	Weight (subject to correction).
Order Emerson, M., & Co. Notify Droste & Snyder, New York, N. Y.	300 tubs of butter.....	21,000
..... This rate is from..... Prepaid.....
To..... Subject to the classification of connecting lines. Through at per 100 pounds, first class. Through at per 100 pounds, second class. Through at per 100 pounds, third class. Through at per 100 pounds, fourth class. Through at per 100 pounds, fifth class. Through at per 100 pounds, sixth class. Through at per 100 pounds, special. Through at per barrel. Through at per car of pounds. Advance charges..... Rental..... Ice..... Car No. —, A. R. S. 5192.....
No single shipment, however small, will be taken for less than the amount allowed by the rules of tariff governing same.		
THE WABASH RAILROAD CO. By H. E. NORTHROP, Agent.		

[T. J. Tobin, auditor; C. H. Newton, freight claim agent.]

50 M—11-18-07.

Standard.

[Form A. O. 500.—The Wabash Railroad Company.—Freight claim department.]

ST. LOUIS, *March 7, 1908.*

(Quote our claim No. 51561 D I. Address mail to desk No. C. H. N.)

MESSRS. DROSTE & SNYDER,
177 Duane St., New York, N. Y.

GENTLEMEN: I have noted your favor of March 5 concerning your claim for \$5,100 for nondelivery of 300 tubs of butter in car A. R. T. 5192.

I wrote Mr. McClellan March 3d that we are as yet not in position to adjust this claim, owing to the unsettled condition of the affairs of Emerson, Marlow & Co.

You refer in your letter to the bills of lading issued by our company. You are, of course, aware that the bill of lading covering this shipment was issued in good faith, but that the property was replevied after being delivered to us, and being removed from our possession by legal process, we had no control over the thing.

Yours, truly,

_____, F. C. A.

[N. Y. Supreme Court. Trial term. Part 14. Plaintiff's Exhibit No. 5. P. B. Sheridan, stenographer.]

\$10,200.00.

CHICAGO, *October 23, 1907.*

10/25/07

Pay to the order of Union Trust Co. ten thousand two hundred 00/ dollars, value received, and charge the same to account of Emerson Marlow Company.

FRANK E. EMERSON.

To Droste and Snyder, New York, N. Y.

No. _____.

[N. Y. supreme court. Trial term, Part 14. Plaintiff's Exhibit No. 8. P. B. Sheridan, stenographer.]

[Telegram.]

CHICAGO, *October 29, 1907—6 p. m.*

DROSTE & SNYDER, *New York:*

You are hereby notified to refuse payment of draft accompanying American Refrigerator Transit Co. lading No. 664, dated the 23d, issued to order Emerson Marlow & Co. Notify Droste & Snyder covering 300 tubs butter as goods will never reach you.

H. G. NORTHROP.

[N. Y. supreme court. Trial term, Part 14. Plaintiff's Exhibit No. 9. P. B. Sheridan, stenographer.]

[Telegram.]

NEW YORK, *October 30, 1907.*

H. G. NORTHROP,

Royal Insurance Building, Chicago, Ill.:

Draft was paid on the 25th. Where are the goods? How are they detained? Give full particulars.

DROSTE & SNYDER.

[New York Supreme Court. Trial term. Part 14. Plaintiff's Exhibit No. 7. P. B. Sheridan, stenographer.]

[The Wabash Railroad Co. General eastern agency, 387 Broadway. H. B. McC——, general ———; freight and passenger agent; E. H. Lake, assistant general eastern agent; A. S. Dunbar, passenger agent; E. W. Nichols, freight agent; L. C. Bostwick, contracting freight agent; C. H. Latta, traveling freight and passenger agent; J. B. Dinning, New Jersey freight and passenger agent; A. A. Yonge, northeastern freight agent; J. D. McBeath, northeastern passenger agent, 176 Washington Street, Boston, Mass.]

NEW YORK, *November 13, 1907.*

Mr. C. H. NEWTON,

Freight Claim Agent, Wabash Railroad, St. Louis, Mo.

DEAR SIR: I invite your attention to the inclosed correspondence from Droste & Snyder, New York, November 12, received at this office to-day. I presume you are

aware of the circumstances connected with this transaction, and I sincerely hope you will enable me to make some kind of reply to Droste & Snyder at a very early date.

Yours, truly,

H. B. McCLELLAN.
G. E. A.

(C. Droste & Snyder, 74 Warren Street, City, 177 Duane Street, City.

Please note and accept this as an acknowledgment of your letter of the 12th, received at this office to-day. As this office has no jurisdiction in such matters, we are compelled to refer it to our freight-claim agent at St. Louis, who, I presume, is familiar with the subject.

There being no further questions, Mr. Droste was thereupon excused.

Senator POMERENE. Mr. Faulkner, may I ask you one question? One of the witnesses here made the suggestion that there ought to be further penalties provided where there was a connivance between a shipper and a freight agent. Are there not State statutes in nearly every one of the States which would protect the railroads in that behalf?

Mr. FAULKNER. I understand that in some there are, but not in others. There are a sufficient number to cover it. But they have had great difficulty in enforcing the law against such offenses.

Mr. DROSTE. May I add just one more word? This bill throws a new sanctity around the authorized agent. I spoke of that before as requiring possibly a certificate of authorization. I believe that it would be to the great benefit of the railroads and for their protection if there were a penal act providing some strong penalty to be imposed upon an unauthorized person signing a bill of lading. Let the penalty fall upon people of that kind. The criminal penalty attaching to the man signing the bill of lading in the manner I have described seems hard, but there would not be a great deal of that when the railroad companies themselves tell their agents that they must not do it. But now in the stress of competition between the roads may not this authorized agent be absent and tell his freight handlers, "You sign that bill of lading," and in that way work in this system quietly, but treat the business in that way, and when a false bill of lading of that kind comes to law finally the railroad company would say, "That is not our authorized agent," and yet he might have been encouraged by that railroad. Respectable roads would not do it, but they are not all respectable. Some might do it; I can name a few that would.

I believe that if a penalty—a strong criminal penalty—is imposed upon any person, railroad agent, or others for signing a bill of lading without authorization, that that would very much safeguard the signing of bills of lading, because the man would then see the prison staring him in the face and it would lessen that risk.

Senator BRANDEGEE. There has been no complaint here as far as I remember that the railroads denied the authority of the party to sign the bill of lading.

Mr. DROSTE. It was denied in this case, the Wabash. This man, notwithstanding he had been signing bills of lading for five years, they said he was not the authorized agent to sign bills of lading, but the evidence was there and the jury could not see it in that light. But they denied it.

**STATEMENT OF J. C. LINCOLN, FORMERLY COMMISSIONER FOR
THE MERCHANTS' EXCHANGE OF ST. LOUIS, MO.**

Mr. LINCOLN. Mr. Chairman, I appear at this time not with the particular view of discussing either of the bills, as that will be discussed by other members of the organization, but for the purpose of laying the foundation of showing the interest of the shipping public in the bill.

I may say that the question of bills of lading has been a very disturbing factor with shippers and railroads for a great many years. In my own experience the railroads have found it difficult in dealing with the bill of lading matters to protect themselves one from the other. I have also found a great difficulty on the part of the shippers in dealing with the bill of lading matter to protect themselves one from the other. Some shippers are disposed to resort to many methods for the purpose of securing bills of lading prior to the delivery of the property, in order that they may acquire money upon it to transact their business. In railroad circles representatives of carriers have in the past been disposed to sign bills of lading either under mistakes or in advance of the receipt of the property for the accommodation of the shipper.

They accomplish, as has been stated by the gentleman who previously addressed you, nothing in a financial way for their own pecuniary benefit. They accomplish a good will on the part of a large shipper under the possibility of controlling traffic to their line.

Another difficulty with bills of lading, and that I blame both shippers and carriers for, is the issuance of exchange bills of lading. That is, a country bill of lading goes to a point. It is desired to conceal something in connection with the property and its point of origin or ownership, and then the old bill of lading is taken up and a straight or clean order bill of lading is issued for the property prior to its receipt by the line that issued the exchange bill of lading, and frequently the property reaches its final destination by another route than the one for which the bill of lading was issued. This is merely discussing in a general way the bill of lading question as indicating the interest on the part of the shippers.

Now, in order to lay the foundation for the very large interest on the part of the shippers, or rather a large number of shippers who are interested, I would state that I was unfortunately, for the labor involved no compensation, president of the National Industrial Traffic League for the four years just prior to November.

In an analysis of the proceedings of the National Industrial Traffic League I find that in the year 1907, the year of its first organization, one of the first questions that was brought up for discussion, and which was considered by that organization, was that of bills of lading. The National Industrial Traffic League embraces within its organization from 25 to 30 boards of trade, chambers of commerce, or other commercial organizations of that character. In addition, the largest shippers in this country, both of grain, lumber, merchandise, iron articles, and cotton, are also represented.

In 1907, at the invitation of commissioners on uniform State laws, we were invited to have committees to confer with the commissioners on uniform State laws as to the enactment of a law to make uniform

bills of lading in the different States. That committee from the league, and many other committees, appeared before the commissioners on uniform State laws for the purpose of discussing these various paragraphs, conditions, etc., in order to make recommendations.

In August, 1909, the act to make uniform the law of bills of lading was adopted by the commissioners on uniform State laws and was recommended for passage in the various States. That was as late as August, 1909, that the recommendation took place. I believe Prof. Williston can confirm me that one State rather anticipated the action of the commissioners and enacted the law very shortly after the recommendation was made. But since August, 1909, 9 States have adopted this act to make uniform the law of bills of lading, and those States are New York, Pennsylvania, Ohio, and Illinois—I refer to those 4 States because there is a larger volume of tonnage in those 4 States than in any other 10 in the country.

Now, what has been the experience under these laws? Of course, it is hard to determine, because they have not been in operation. In Illinois the act was passed at the last legislature, but it was thought that it did not give the degree of protection to the shippers that they were entitled to, and I will say for the shippers that it was felt—by reason of penalties under the forgery clause and connivance on the part of shippers to obtain a fraudulent bill of lading, or a bill of lading that misrepresented anything—that it was a protection to the railroad.

Now, drifting for the moment—and I might say entirely—from the act to make uniform the laws for bills of lading, there was in 1908, as I recall it, introduced in Congress a bill pertaining to bills of lading. It was thought advisable by reason of the conflicting laws of the various States, and in the absence of a Federal statute, which had that effect upon the State laws, that it would be advisable to have a Federal bill of lading act in order, as to interstate commerce, to supplant the State acts. The Stevens bill was introduced which gave protection to shippers. It incorporated within its provisions many of those things which were desired by the shippers. It was not, however, a complete code as related to bills of lading.

At this session of Congress there has been introduced a new bill, known as the bill S. 4713, and commonly referred to as the Pomerene bill. The analysis or comparison with that bill indicates that it is drawn along the same line as the act to make uniform the laws of the various States. I have been impressed with that bill from the fact that nine States have adopted the bill. So that a Federal regulation would be proceeding somewhat along the same lines that have been adopted by nine States, and along the lines of education throughout the United States, because the bill is being introduced in the various legislatures through the other States, or will be during this coming season, so I am informed.

I want to say that as far as the New York Industrial Traffic League is concerned it has indorsed both bills. At a meeting last evening held under the auspices of the league and which was attended by representatives from all sections of the country, as well as interests that were not identified with the league, a resolution was adopted—

That after careful consideration of each bill the meeting indorse Senate bill No. 4713 as the more comprehensive legislation with reference to the law of bills of lading, as protective of all interests involved, the shipper, carrier, receiver, and banker.

I think it unnecessary for me to repeat here the list of those in attendance at that meeting, but for the convenience of the members of the committee I will file this memorandum giving the names.

The CHAIRMAN. That will be inserted in the record.

The list referred to is as follows:

Meeting of various interests at the Hotel Willard, Washington, D. C., February 29, 1912, for consideration of bills now before Congress, in the matter of bills of lading, particular attention being given to bills S. 957 and S. 4713, there being present the following:

J. C. Lincoln, commissioner, Merchants' Exchange, St. Louis, Mo.

Henry L. Gorman, Produce Exchange, Toledo, Ohio.

A. L. Goetzmann, Millers' National Federation, Chicago.

George A. Schraeder, chamber of commerce, Milwaukee.

Edward Andrews, board of trade, Chicago, Ill.

Robert R. Clark, Davis Milling Co., St. Joseph, Mo.

T. R. Warrick, Elwood Grain Co., St. Joseph, Mo.

H. G. Krake, Commercial Club, St. Joseph, Mo.

William T. Cornelison, board of trade, Peoria, Ill.

C. B. Pierce, board of trade, Chicago, Ill.

Charles J. Austin, New York Produce Exchange.

W. M. Hopkins, board of trade, Chicago, Ill.

Cornelius Lynde, Association of Commerce, Chicago, Ill.

E. E. Williamson, Washington, D. C.

Oscar F. Bell, Crane Co., Chicago, Ill.

Theodore F. Ismert, Ismert-Henkle Milling Co., Kansas City, Mo.

G. H. Lewis, chamber of commerce, Cincinnati, Ohio.

F. L. Sullivan, American Hominy Co., Indianapolis, Ind.

F. H. Price, Millers' National Federation, New York.

F. T. Bentley, Illinois Steel Co., Chicago.

L. D. Nellis, Kemper Mill & Elevator Co., Kansas City, Mo.

Mr. LINCOLN. Now, it was not the purpose of myself—and so agreed to by the other members of the committee—that I should discuss the bill in any of its details or its provisions, but while I am before you I do want to point to one thing which I think will clear up the situation possibly a little.

As to the amount of work that has to be done under any of these bills in the way of issuance of bills of lading, it is stated by the railroads—and I have no doubt such statement is correct; I do not contradict it at all—that probably 5 per cent of the bills of lading, that is, so-called order bills of lading, or less, are issued. The balance of the bills of lading—nonnegotiable bills of lading—are, in cases of shipments, being forwarded on ordinary shipments in which there is only an ordinary receipt taken. The great percentage of the detailed work involved in handling bills of lading is involved with that class of bills of lading covering merchandise shipments, less than carload shipments, or mixed carload shipments of implements, furniture, and things of that kind, and the railroads are relieved from the work of separation of such bills of lading, and, as I say, they nearly all are merely straight bills of lading, by the adoption on the part of the manufacturer or large shipper of a special form made to suit the transactions in his particular line of business; so that all he would have to fill in is the number of boxes. The hardware is printed in. So that a great deal of the necessary detail work is accomplished. All that is necessary to fill in is the amount. It is taken to the station and the agent receipts it, and on those straight bills of lading the receipt is usually filed with the shipper and not even a copy of it sent on. If the goods move on a straight waybill, a man gets notice ordinarily through the invoices of notice of arrival on the part of the agent.

Now, as to the order bill of lading, a large part of them are made out by the shipper of the goods. He prepares them in detail, and I have recommended to my organization in St. Louis that they use a type-writer as far as possible in order to make it thoroughly legible, also to use pen and ink and not make mere pencil notations. That is done for the convenience of the railroads in those cases, but all order bills of lading are issued upon the form of the company, of a certain color, for the purpose of distinction so that the banks can recognize it, and so as to avoid the possibility of a nonnegotiable, or other than the negotiable instrument, being used through the banks. With the exercise of due care on the part of the bank, if they do ever advance money with a bill of lading as collateral, there is no occasion for advancing money on any other than the blue document.

The ACTING CHAIRMAN (Senator Brandegee). It is evident that you can not finish this afternoon, Mr. Lincoln, and the committee will now take a recess until to-morrow morning.

Accordingly, at 4 o'clock and 45 minutes p. m., the committee took a recess until to-morrow, Saturday, March 2, 1912, at 10.30 o'clock a. m.

SATURDAY, MARCH 2, 1912.

COMMITTEE ON INTERSTATE COMMERCE, UNITED STATES SENATE, Washington, D. C.

The committee met at 10.30 o'clock a. m.

Present: Senators Brandegee (acting chairman), Foster, Newlands, Townsend, Oliver, Clarke, and Pomerene.

STATEMENT OF J. C. LINCOLN—Resumed.

Mr. LINCOLN. Mr. Chairman and gentlemen, before we adjourned last evening, I gave a slight recitation of the history of the bill of lading question considered by the shipping interests, and as a matter of record, possibly as indicating more definitely the character of the National Industrial Traffic League, it might be well to have inserted in the record the membership, and I will leave this roster with the reporter for that purpose, with the permission of the committee. The membership is shown alphabetically by States on pages 31 to 43, inclusive. This is the record of January 1, 1911. There have been about 15 additional organizations, the names of which I have not with me, that have been added since. This is merely to give you an index to the character and diversified business connected with the league, which has indorsed the legislation as to bills of lading.

The ACTING CHAIRMAN. Do you desire it to be inserted in the record?

Mr. LINCOLN. Yes, sir.

The ACTING CHAIRMAN. If there be no objection, that will be done. The list of names is as follows:

ALPHABETICAL LIST BY CITIES.

Aberdeen, Wash.:

Burrows Lumber Co. L. M. Roser, manager.

Akron, Ohio:

American Sewer Pipe Co. Ross W. Smith, T. M.

Atlanta, Ga.:

Southern Cotton Oil Co. H. W. B. Glover, T. M.
Virginia-Carolina Chemical Co. H. W. B. Glover, T. M.

Baltimore, Md.

Baltimore Chamber of Commerce. Herbert Sheridan, T. M.
Merchants & Manufacturers' Association. A. E. Beck, T. M.

Billings, Mont.:

Billings Chamber of Commerce. W. A. Selvidge, president.

Birmingham, Ala.:

Merchants & Manufacturers' Association of Birmingham. J. T. Slatter, manager freight bureau.

Bloomington, Ill.

Bloomington Business Men's Association. J. S. Joplin, chairman traffic committee.

Harber Bros. Co. J. S. Joplin, T. M.

Boston, Mass.:

New England Board of Transportation. D. O. Ives, manager transportation department.

United Shoe Machinery Co. C. B. Baldwin, manager transportation department.

Buffalo, N. Y.:

Chamber of Commerce and Manufacturers Club. W. H. Frederick, general traffic manager.

Larkin Co. James Collord, T. M.

Manufacturers' Club of Buffalo. William H. Frederick, T. T. M.

National League of Commission Merchants. R. E. Hanley, business manager.

Canton, Ill.:

Parlin & Orendorff Co. W. M. Cave, T. M.

Cedar Rapids, Iowa.

Cedar Rapids Commercial Club. John Wunderlick, secretary.

Douglas & Co. B. H. O'Meara, T. M.

Chicago, Ill.:

American Cotton Oil Co. C. A. Jennings, manager transportation department.

American Radiator Co. H. W. Richards, T. M.

Anaconda Copper Mining Co. M. S. Dean, T. M.

Automatic Electric Co. W. E. Cooke, T. M.

Barrett Manufacturing Co. E. H. Poetter, T. M.

Berry Coal Co. A. L. Berry, president.

Board of Trade of City of Chicago. W. M. Hopkins, manager transportation department.

Butler, J. W., Paper Co. Harry A. Washburn, T. M.

Chicago Association of Commerce. H. C. Barlow, T. D.

Crane Co. O. F. Bell, T. M.

Hardwood Lumber Exchange. Edmond F. Dodge, advisory to railroad commission.

Hardwood Manufacturers' Association of United States. R. L. McClelland, chairman transportation commission.

Illinois Manufacturing Association. John M. Glenn, secretary.

Illinois Steel Co. F. T. Bentley, T. M.

International Banana Food Co. L. D. Rosenheimer, T. M.

International Harvester Co. F. B. Montgomery, manager traffic department.

Jaques Manufacturing Co. R. J. Wallace, T. M.

Montgomery Ward & Co. J. Charles Maddison, T. M.

National Association of Tanners. Cudworth Beye, secretary.

National Implement and Vehicle Manufacturers' Association of United States. W. J. Evans, F. T. M.

National Paint, Oil, and Varnish Association. Louis L. Drake, secretary.

National Piano Manufacturers' Association of America. Thomas C. Moore, T. M.

National Poultry, Butter, and Egg Association. W. F. Priebe, chairman transportation commission.

National Shoe Wholesalers' Association of United States. S. W. Campbell, secretary.

Paepcke-Leicht Lumber Co. W. Williams, T. M.

Quaker Oats Co. L. Richards, T. M.

Reyerson, Jos. T., & Son. Robert C. Ross, manager shipping department.

Sefton Manufacturing Co. E. C. Wilmore, T. M.

Spiegel-May-Stern Co. D. T. Talmonde, T. M.

United States Gypsum Co. A. W. Dowler, T. M.

Wisconsin Pulp and Paper Manufacturers. W. D. Hurlbut, T. M.

- Cincinnati, Ohio:
 Receivers and Shippers' Association of Cincinnati. E. E. Williamson, commissioner.
- Cleveland, Ohio:
 Chamber of Commerce of Cleveland. S. R. Mason, transportation secretary.
 Grisselli Chemical Co. John Hart, T. M.
 National Carbon Co. A. J. Mitchell, T. M.
 National Electric Lamp Association. H. N. Sibbold, T. M.
 National Petroleum Association. Fred W. Boltz, T. M.
- Clinton, Iowa:
 Clinton Manufacturers and Shippers' Association. M. Dight Smiley, secretary.
- Dayton, Ohio:
 Ohio Shippers' Association. W. B. Moore, chairman executive committee.
 Traffic Bureau of the Dayton Chamber of Commerce. Walter B. Moore, secretary.
- Denver, Colo.:
 Colorado Fuel & Iron Co. R. L. Hearon, T. M.
 Colorado Manufacturers' Association and Transportation Bureau. F. W. Maxwell, commissioner.
 Western Fruit Jobbers' Association. William D. Tidwell, secretary.
- Des Moines, Iowa:
 Des Moines Elevator Co. M. McFarlin, president.
 Greater Des Moines Committee. E. G. Wylie, freight commissioner.
 Iowa State Manufacturers' Association. G. A. Wrightman, secretary.
 Western Grain Dealers' Association. G. A. Wells, secretary.
- Detroit, Mich.:
 Detroit Board of Commerce. Robt. H. Day, manager transportation.
 Michigan Manufacturers' Association. H. H. Smith, attorney.
- Duluth, Minn.:
 Commercial Club of Duluth. G. Roy Hall, traffic commissioner.
 Gowan-Peyton-Twohy Co. George R. Reed, T. M.
 Kelly-How-Thomson Co. Frank A. Davison, T. M.
 Marshall-Wells Hardware Co. C. F. Rowe, T. M.
 Patrick & Co., F. A. E. A. Ridson, T. M.
 Stone-Ordean-Wells Co. H. A. Earnshaw, T. M.
 Thomas Thompson Co., The. L. L. Culbertson, president.
- El Paso, Tex.:
 El Paso Chamber of Commerce. A. W. Reeves, T. M.
- Erie, Pa.:
 Manufacturers' Association of Erie. Ray Himrod, secretary.
- Evansville, Ind.:
 Evansville Manufacturers' Association. J. C. Kellar, manager traffic department.
- Fort Smith, Ark.:
 Fort Smith Freight Bureau. C. D. Mowen, commissioner.
- Fort Wayne, Ind.:
 Bowser & Co. (Incorporated), The S. F. J. O. Goff, T. M.
- Fort Worth, Tex.:
 Fort Worth Board of Trade. R. L. Greene, secretary.
 Fort Worth Freight Bureau. R. O. McCormack, secretary and T. M.
 Southwestern States Portland Cement Co. E. M. Gleason, T. M.
- Goshen, Ind.:
 Inter-State Hay Co. H. E. Johnson, T. M.
- Hamilton, Ohio:
 Champion Coated Paper Co.
 Champion Fiber Co. H. T. Ratliff, T. M.
- Hegewisch, Ill.:
 Pressed Steel Car Co. (Pittsburgh, Pa.) National Board, G. F. A.
 Western Steel Car & Foundry Co. National Board, G. F. A.
- Houston, Tex.:
 Houston Business League. C. C. Oden, T. M.
- Indiana Harbor, Ind.:
 Inland Steel Co. C. L. Lingo, T. M.
- Indianapolis, Ind.:
 Indianapolis Freight Bureau. J. Keavy, commissioner.
- Johnstown, Pa.:
 Cambria Steel Co. William A. Sproull, T. M.
- Kansas City, Mo.:
 Kansas City Transportation Bureau of Commercial Club. H. G. Wilson, transportation commissioner.
 United Kansas Portland Cement Co. B. E. Allison, T. M.

Kenosha, Wis.:

Simmons Manufacturing Co. F. H. Truax, T. M.

Lackawanna, Erie County, N. Y.:

Lackawanna Steel Co. W. E. Howes, T. M.

Lincoln, Nebr.:

Lincoln Commercial Club. W. S. Whitten, secretary.

Little Rock, Ark.:

Merchants' Freight Bureau. A. R. Bragg, T. M.

Los Angeles, Cal.

Associated Jobbers of Los Angeles. F. P. Gregson, T. M.

Louisville, Ky.:

Louisville Board of Trade. J. J. Telford, secretary transportation committee.

Louisville Cotton Oil Co. Charles Kimmich, T. M.

Memphis, Tenn.:

Memphis Freight Bureau. James S. Davant, commissioner.

Memphis Grain & Hay Association (Incorporated). C. B. Stafford, commissioner.

Milwaukee, Wis.:

Chamber of Commerce of Milwaukee. George A. Schroeder, manager freight bureau.

Johns-Manville Co., The H. W. W. C. Morgenroth, T. M.

Milwaukee Tanners' Freight Bureau. A. B. Caswell, manager.

National Brake & Electric Co. M. F. Ries, T. M.

Pabst Brewing Co. C. Zielke, T. M.

Schlitz Brewing Co. C. J. Bertchy, T. M.

Minneapolis, Minn.:

Minneapolis Traffic Association. W. P. Trickett, executive manager.

Van Dusen-Harrington Co. H. A. Feltus, T. M.

Moline, Ill.:

Deere & Co. A. R. Ebi, T. M.

Monmouth, Ill.:

Western Stoneware Co. C. S. Wise, manager traffic department.

Montgomery, Ala.:

Montgomery Business Men's League. H. S. Kealhofer, secretary.

Muncie, Ind.:

Ball Bros. Glass Manufacturing Co. L. A. Clark, T. M.

New Orleans, La.:

Southern Cypress Manufacturers' Association. E. W. McKay, T. M.

New York City:

American Hide & Leather Co. H. L. Pratt, manager traffic department.

American Tobacco Co. C. S. Keene, T. M.

Arbuckle Bros. J. L. Carling, T. M.

Barrett Manufacturing Co. J. L. Roberts, G. T. M.

Bradley Co., Herbert. F. H. Price, president.

Brooklyn Cooperage Co. R. M. Parker, president.

Butler Bros. Robt. H. Forbes, T. M.

National Association of Automobile Manufacturers (Inc.). James S. Marvin, G. T. M.

Pitt & Scott (Ltd.). E. N. Whiting.

United Box Board & Paper Co. C. C. Furgason, T. M.

United Shoe Machinery Co. E. W. Morgan, express agent.

West Virginia Pulp & Paper Co. C. H. Tiffany, T. M.

Omaha, Nebr.:

Commercial Club of Omaha. J. M. Guild, commissioner.

Omaha Grain Exchange. F. P. Manchester, secretary.

Traffic Bureau Commercial Club. E. J. McVann, manager.

Ottumwa, Iowa:

Dain Manufacturing Co., of Iowa. Paul Arbenz, secretary.

Peoria, Ill.:

Clarke Bros. & Co. R. M. Field, T. M.

Corning & Co. R. M. Field, T. M.

Perth Amboy, N. J.:

Jackson, Geo. W. Expert auditor and claim agent.

Wharton Steel Co. G. W. Jackson, superintendent car service.

Philadelphia, Pa.:

Chamber of Commerce. N. B. Kelly, freight commissioner.

Commercial Exchange of Philadelphia. Frank E. Marshall, secretary.

Pennsylvania Steel Co. H. M. Newlin, freight agent.

Scott Paper Co. Clement T. Clements, T. M.

Pittsburgh, Pa.:

American Lumber & Manufacturing Co. M. Riely, manager traffic department.
 American Sheet Tin Plate Co. A. G. Young, T. M.
 Carnegie Steel Co. L. C. Bihler, T. M.
 Chamber of Commerce of Pittsburgh. Ira S. Bassett, T. M.
 Fort Pitt Malleable Iron Co. Frank J. Lanahan, president.
 Heinz Co., H. J. W. H. Robinson, treasurer.
 Jones & Laughlin Steel Co. F. A. Ogden, general freight agent.
 Macbeth-Evans Glass Co. C. R. Peregrine, T. M.
 Oil Well Supply Co. R. H. Thomson, T. M.
 Pittsburg Plate Glass Co. J. M. Belleville, G. F. A.
 Pittsburg Steel Co. A. R. Kennedy, T. M.
 Republic Iron & Steel Co. H. R. Moore, T. M.
 Republic Metalware Co. H. W. Ballinger, T. M.
 Standard Sanitary Manufacturing Co. J. E. Henry, T. M.

Pontiac, Ill.:

Illinois Grain Dealers' Association. S. W. Strong, secretary.

Quincy, Ill.:

Quincy Freight Bureau. L. B. Boswell, commissioner.
 United Cereal Mills (Ltd). J. E. Linihan, secretary and general manager.

Richmond, Va.:

Richmond Chamber of Commerce. E. S. Goodman, T. M.

Rockford, Ill.:

Emerson-Brantingham Co., H. W. Jackson, T. M.
 Rockford Manufacturers & Shippers' Association. C. B. Gregory, secretary.

St. Joseph, Mo.:

Commercial Club of St. Joseph. H. G. Krake, commissioner.

St. Louis, Mo.:

Anheuser-Busch Brewing Co. R. Muehlberg, T. M.
 Bottle Manufacturers' Association. W. F. Obear, chairman freight commission.
 Chicago Lumber & Coal Co. George Reeves, T. M.
 Lemp Brewing Co., Wm. J. L. Feickert, T. M.
 Mallinckrodt Chemical Works. H. A. Borgmann, T. M.
 Merchants' Exchange of St. Louis. J. C. Lincoln, commissioner traffic bureau.
 Missouri Manufacturers' Association. P. M. Hanson, chairman transportation commission.
 National Candy Co. W. C. Lindsay, T. M.
 National Enameling & Stamping Co. P. M. Hanson, T. M.
 Rodehaver, C. H., traffic manager.

Sacramento, Cal.:

Merchants & Manufacturers' Traffic Association. G. J. Bradley, secretary and T. M.

Salt Lake City, Utah:

Commercial Club Traffic Bureau. S. H. Babcock, commissioner of traffic.

Sandusky, Ohio:

Hinde & Dauch Paper Co. Joe McFadden, T. M.

San Francisco, Cal.:

Traffic Bureau of the Merchants' Exchange. W. R. Wheeler, manager.

Schenectady, N. Y.:

General Electric Co. Maj. A. J. Gifford, manager transportation department.

Seattle, Wash.:

Transportation Bureau Seattle Chamber of Commerce. W. A. Mears, manager.

Shreveport, La.:

Chamber of Commerce. George T. Atkins, jr., T. M.

Sioux City, Iowa:

Traffic Bureau Sioux City Commercial Club. Geo. T. Bell, commissioner.

Sterling, Ill.:

Sterling Manufacturers' & Shippers' Association. W. E. Long, T. M.

Steubenville, Ohio:

Labelle Iron Works, A. P. Oxtoby, T. M.

Toledo, Ohio:

Goemann Grain Co., The. Henry L. Goemann, president.
 National Supply Co. J. F. Ryan, T. M.
 Toledo Produce Exchange. H. L. Goemann, T. M.
 Toledo Chamber of Commerce. Louis H. Paine, secretary.
 Woolson Spice Co. L. G. Macomber, T. M.

Topeka, Kans.:

Kansas Grain Dealers' Association. E. J. Smiley, secretary.

Utica, N. Y.:

Utica Traffic Bureau. J. E. Hundley, commissioner.

Warren, Ohio:

General Fire Extinguisher Co. C. H. Bell, T. M.

Wichita, Kans.:

Transportation Bureau, city of Wichita. Martin E. Casto, commissioner.

Winston-Salem, N. C.:

Reynolds Tobacco Co., R. J. J. L. Graham, T. M.

Wyandotte, Mich.:

Ford Co., The J. B. J. S. Kellie, T. M.

Senator TOWNSEND. What legislation have they indorsed? You say they have indorsed legislation.

Mr. LINCOLN. They have indorsed the law making uniform bills of lading as applied to the States, and they have asked for Federal legislation for bills of lading so as to give something that will cover interstate rather than depend upon State form.

I have only a few more remarks to make. I wish to say that it is my observation that a protective bill of lading legislation is something not only necessary for the shippers but something that is absolutely necessary for the railroads, in order that they may protect themselves as against competition between themselves in the issue of exchange bills of lading and the issuance of bills of lading for property that is not really in their possession. Accommodations—and those bills of lading are merely accommodation bills of lading—are rendered by the carriers' representatives in which there is no fraud on the part of the representative of the railroad who does not desire to aid or abet any fraud; and with more stringent regulations the carriers are going to receive a great benefit from the protection given to bills of lading and a restriction placed upon the issuance of bills of lading.

Now, these exchange bills of lading are not issued by incompetent people. Most of the trouble in connection with the bills of lading has arisen in large cities or cities where there are thoroughly competent men. I might say that the exchange bills of lading are usually issued by a high class of men—men who are receiving good salaries—that is, the commercial agents, division freight agents, or general agents.

There is another difficulty that the shippers meet with, and particularly in certain sections of the country, and that is the delivery of property without the surrender of an order bill of lading. The carrier will take a bond from a receiver of the property that the freight charges will be paid, and if there is a lawful claim they will be protected by that bond, but as to the shipper of the grain, his money is being used until the consignee of the grain disposes of it, and finds that it is his pleasure to take the bill of lading up at the bank. This bill will in a measure, at least, if not entirely, eliminate that practice.

There is no question in my mind that the carriers have not given the proper regard to the values of their form of bills of lading, and their instructions to their agents, with regard to promiscuous distribution of order bills of lading, are defective. I am quite sure that no agent—and I have found the average class of agent above the ordinary class of men employed in the humbler pursuits—will issue an order bill of lading when he has positive instructions with regard to that piece of paper, and will exercise more care if the executive officers, or the directing officers of the railroad, will instruct them to give more care to the bills of lading.

I think that is all I desire to say.

The ACTING CHAIRMAN. You have spoken about the practice that existed in some sections of the country of exchanging the original bill of lading en route, for the purpose of concealing the origin of the shipment, or for other purposes. Is that practice extensively engaged in?

Mr. LINCOLN. It is rather extensively engaged in. It is not as extensively engaged in now as it was two or three years ago, nor are the difficulties which were experienced two or three years ago being experienced at this time. It was formerly a very common practice to issue exchange bills of lading for a connecting line bill of lading, before the arrival of the property at the interchange point, with the connecting line. The orders of the Interstate Commerce Commission with regard to the issuance of bills of lading has remedied that very largely, so that the exchange bills of lading are not being given until they get the property, although some roads do depart from it.

Take a shipment, we will say, moving by line A, from Kansas City to St. Louis, destined to New York in care of line B at St. Louis. Now, the line B, running from St. Louis to New York, will take up line A bill of lading at St. Louis and issue a new bill of lading in exchange for that, issuing those as the shipper and a new consignee. Now, it has frequently occurred that where the exchange bill of lading has been given, the property never reached the line that gave the exchange bill of lading, but by reason of diversion reached the market by some other road; so you have a bill of lading outstanding for the car at destination, with nobody claiming—with nobody holding the bill of lading—and the proper party could not be located because of that change.

The ACTING CHAIRMAN. What was the object in wanting to conceal the origin of the goods?

Mr. LINCOLN. Some people have their regular patrons, and they want to appear as the shippers so that the man who purchases can not go back to the point of origin and ascertain who was the shipper.

The ACTING CHAIRMAN. Is there anything in either of these bills that touches upon that question?

Mr. LINCOLN. There is the question of issuing the bills of lading for property not in possession.

The ACTING CHAIRMAN. I mean anything that would stop the issue of what you would call exchange bills of lading, or the practice of exchanging—issuing a new one?

Mr. LINCOLN. Nothing to stop the issuance of exchange bills of lading or giving the new bills of lading for the first bill of lading when they receive the property, because the man has the right to change the terms of his contract.

The ACTING CHAIRMAN. You do not ask for anything of that kind?

Mr. LINCOLN. No, sir.

Senator TOWNSEND. I desire to ask one or two questions. This custom about which you have just spoken has been condemned by the Interstate Commerce Commission, has it not?

Mr. LINCOLN. It has; yes, sir.

Senator TOWNSEND. And so there is not much complaint made on that account now, is there?

Mr. LINCOLN. Not so much. There is very little complaint on account of bills of lading being issued for property not in possession of the carrier.

Senator TOWNSEND. But you think the bill known as the Pomerene bill—

Mr. LINCOLN. The Pomerene bill, I think, goes further than the Stevens bill, or makes more definite the bill of lading legislation than the Stevens bill.

Senator TOWNSEND. Is that the bill you favor?

Mr. LINCOLN. Yes, sir, as a representative of the organizations I represent.

Senator TOWNSEND. I think that is all I care to ask. I think you have covered all the questions that I intended to ask.

There being no further questions, Mr. Lincoln was thereupon excused.

STATEMENT OF GEORGE W. NEVILLE, OF WELLS & NEVILLE, HOUSTON, TEX., REPRESENTING THE NEW YORK COTTON EXCHANGE, WHOSE MEMBERSHIP EMBRACES MERCHANTS THROUGHOUT THE COTTON BELT.

Mr. NEVILLE. Mr Chairman and gentlemen, we have been trying to get legislation of this kind passed since 1906. I was drawn into it first by bill of lading irregularities issued at Belton, Tex., by the Gulf, Colorado & Santa Fe Railroad agent, the said agent having been signing bills of lading for the Gulf, Colorado & Santa Fe Co. for five years previous to that. During the fall of 1906 my firm bought from the cotton shipper at Belton, Tex., cotton that they had been buying from this man for five years previously to that. Those bills of lading were dated beginning October 10 and ran through the month of October, in through November, and as late as December, 1912. There was a great freight congestion that year. We have a custom in our office in Texas that when we have a bill of lading in the office for a week and the cotton is not delivered to us, we immediately start a tracer for that cotton, giving the number of the bill of lading, the marks, and the point of origin, and the date. Not hearing from the tracer, except that they had received the request and were investigating it, we renewed these tracers from time to time, and finally in the beginning of December—about the middle of December—we wrote the Gulf, Colorado & Santa Fe that we had outstanding bills of lading from Belton, amounting to about 1,800 bales of cotton, and to please let us know when the cotton would reach us.

On December 24—the evening of December 24—the agent of the Gulf, Colorado & Santa Fe at Belton, Tex., with the general freight agent located at Houston, Tex., came in the office and saw my representative and stated that the “bills of lading signed by me”—the Belton agent speaking—“covering certain cottons, the cotton will never reach you.” “Why?” “Because the banks have come on our platform and taken the cotton away, claiming that this shipper owed them money.” So our representatives immediately got in touch with my New York office, with the result that the day after Christmas I went to Texas and went to see our Houston (Tex.) attorney, Capt. J. C. Atkins, who is known to some Members of Congress, having been a former Congressman—and he said, “Well, George, I have looked into this, and you are up against it. According

to the Freidlander case, you have no claim against the railroad." "Well," I said, "I do not know much about the Freidlander case, but as a matter of equity it looks as if we had a claim against the Santa Fe road." After discussing the matter some time with him, I went back to the office and found a letter from the operating department of the Gulf, Colorado & Santa Fe Railroad, acknowledging receipt of our letter of the middle of December giving a detailed statement of these bills of lading and asking for a tracer—acknowledging receipt of that letter and stating that all of that cotton was on their railroad platform at Belton, Tex., and would be moved as soon as they could get cars to move it. I took that letter and went back to see Capt. Hutchins. He read it. He said "You will get your money." That letter was dated December the 26th, two days after the agent of the railroad and the general freight agent of that road had been to my office and said there had been no cotton shipped against it. I immediately got in touch with the vice president and general manager of the railroad in Texas, and was referred by him to the Chicago office, Mr. Ripley. I went to Chicago and finally had to go to New York to see the vice president of the road who had that matter in charge. I stated the case to him, and he said "Mr. Neville, if our investigation makes a case one-half as strong as you put it, we will give you the money without suit."

Finally we got our money. That brought us to thinking, and we had our attorneys in Texas and in New York investigate the laws, and found that there was no law holding any carrier responsible for bills of lading signed by their agents.

Custom, gentlemen, has given the order bill of lading a semblance of negotiability. The railroads have been a party to this as much as the shippers and the consignees, in giving this air of negotiability to the bill of lading. If the railroads, when these errors are found, discharged, or sought to punish their railroad agents, perhaps there would be some reason for taking the position in the matter that they do; but I have never yet heard of a railroad agent being dismissed for issuing a bill of lading without having received the goods, or whether there was any doubt about his having received the goods or not.

I have listened to Mr. Bond and to the other gentlemen from the railroad side who have spoken of the difficulty of getting honest men to represent them at railroad stations. Gentlemen, the finest compliment that can be paid to the railroad companies is that the losses of railroad companies are so few, and all the losses are at competitive points. For every dollar lost at a local station I will name a thousand dollars lost at a competitive point.

This thing is getting to be kind of wearisome to everybody—the reason why they should not be held liable for the contents of their bills of lading for goods which they state they have not received for shipment and transportation to a certain given point.

In investigating the matter through our attorneys we discovered that there were no laws to that effect. So I came to Washington, and I remember seeing you, Senator Townsend, and you told me that the bankers had been working in regard to this matter, and then I got in touch with Mr. Payton and Mr. Pierson, and the bill as before the committee to-day is one entirely different from that which was first introduced.

That is all I have to say.

The ACTING CHAIRMAN. Which bill do you favor?

Mr. NEVILLE. I have no feeling, Mr. Senator, for either bill. What we want is relief. If I had the drawing of a bill I think I could make one of 10 lines that would answer the question.

The ACTING CHAIRMAN. Does any Senator desire to inquire?

Senator CLARKE. I do not see what grievance you had against the railroad company. The cotton was on the platform when the agent signed the bill of lading?

Mr. NEVILLE. Yes, sir.

Senator CLARKE. Between the signing of the bill of lading and the actual forwarding of the cotton, some third person attached it as the property of the shipper?

Mr. NEVILLE. We placed the cotton there, Senator, from October 10 to December 12.

Senator CLARKE. And the cotton was on the platform all this time?

Mr. NEVILLE. The railroad had ample time to forward the cotton. The bills of lading were signed under the same identical conditions that the agent had been signing thousands of other like bills of lading.

Senator CLARKE. There is no dispute about that. The question is that they had signed the bills of lading, but were slow in getting it out—that is your grievance?

Mr. NEVILLE. No. They claim they were not responsible for the bills of lading where they had possession and somebody came and took it away.

Senator CLARKE. You did not find that, because that is not so.

Mr. NEVILLE. What is not so?

Senator CLARKE. About their not being liable on the bills of lading if they had possession of the cotton at the time they signed it. They are liable under those conditions.

Mr. NEVILLE. The only thing that saved me from the expense of a law suit was the letter that I received from the transportation department without the knowledge of the freight department.

Senator CLARKE. From a legal standpoint, it did not have anything to do with it. It turned upon the fact that at the time the agent signed the bills of lading he had possession of the cotton and should have delivered it, and he would have had to interpose some further excuse which would answer the requirements of the law.

Mr. NEVILLE. The refusal of the freight department to acknowledge the validity of those bills of lading.

Senator CLARKE. There never was any dispute about that?

Mr. NEVILLE. Yes, sir.

Senator CLARKE. On what grounds?

Mr. NEVILLE. That the agent had signed the bills of lading and the cotton was on their platform, and they had made no effort to prevent the removal of that cotton.

Senator CLARKE. Did they not have a right to deliver that cotton to somebody who came there with a legal process?

Mr. NEVILLE. But it did not come from a legal source.

Senator CLARKE. Oh, they voluntarily took it away?

Mr. NEVILLE. Yes, sir.

Senator CLARKE. That is different. I assumed that the banker went there with an officer.

Mr. NEVILLE. No, sir. He sent drays there and took the cotton away.

Senator CLARKE. I did not understand you. That is all right. That is a different question, and one that is not confined to railroad or anybody else. I understand you now. I have no further comments to make.

The ACTING CHAIRMAN. Any further inquiries?

Senator POMERENE. In that connection I wish you would explain in the record a little more fully what the title was to this cotton which was claimed by the bankers.

Mr. NEVILLE. The railroad platform which they used in Texas was a receiving platform of a cotton compress which was then closed down, abandoned. The Gulf, Colorado & Santa Fe Railroad Co., in order to get the business at that point in competition against the Missouri, Kansas & Texas Railroad, leased that press platform and their platform, and gave the merchants and farmers in that community free storage on that platform in order to get the cotton of the town, the wagon receipts of that town, delivered to them, so that they could get the freight out of Belton.

The man from whom we have been buying for six years gave him shipping orders to the railroad, as he had done in the past five years, and the railroad on that shipping order signed bills of lading. When the cotton laid in the cars it was customary at that point to brand or mark the cotton in accordance with the bills of lading, each number of bales, as was covered by the shipping order against a stated bill of lading.

Owing to a freight congestion the Santa Fe could not get cars, and when it developed that this shipper was in trouble the two local banks claimed, without any authority at law or from the law, or from the court, rather, that they had a lien on this property, and they immediately sent drays to the platform of the Gulf, Colorado & Santa Fe Railroad and hauled the cotton to the Missouri, Kansas & Texas Railroad and shipped it out.

Now, that is as far as I can state to my own knowledge.

Senator POMERENE. That is, that the banks had a lien—what lien?

Mr. NEVILLE. The banks claimed that they had paid for the cotton.

Senator CLARKE. Did they have the warehouse receipts?

Mr. NEVILLE. My information is that they did not.

Senator CLARKE. It is a simple case of diverting property?

Mr. NEVILLE. That is my opinion.

Senator TOWNSEND. You say you could draw a bill in 10 lines?

Mr. NEVILLE. I think I could.

Senator TOWNSEND. Have you any objection to submitting your views in such a form to the committee and filing here what in your judgment such a bill should be?

Mr. NEVILLE. I think, briefly speaking, that a bill—

The ACTING CHAIRMAN. He means will you not prepare a draft of a bill and leave it with the committee, so that we can look over it?

Mr. NEVILLE. I can send it to you.

The ACTING CHAIRMAN. That is what he means.

Senator TOWNSEND. That is what I mean.

Mr. NEVILLE. It may be from a business man's point of view.

Senator TOWNSEND. That is all right.

Senator POMERENE. It will give us your thoughts at least.

Senator TOWNSEND. We have made that request of various witnesses who have appeared here, so that we could get in a concrete form what their views were.

Mr. NEVILLE. I will do so with pleasure.

The ACTING CHAIRMAN. Anything further?

There being no further questions, Mr. Neville was thereupon excused.

The ACTING CHAIRMAN. Now, Senator Faulkner, who is your next witness?

Mr. FAULKNER. I am.

STATEMENT OF HON. CHARLES J. FAULKNER, WHO APPEARED IN BEHALF OF A NUMBER OF SOUTHERN, EASTERN, AND WESTERN RAILROADS.

Mr. FAULKNER. Mr. Chairman and gentlemen of the committee, it is unfortunate that I must attempt to make an argument before the committee upon the question now pending before it, as I have been suffering for three days with a very severe cold, finally resulting in a bad sore throat, which seems to have increased daily. Realizing that the committee can wait on no one, and that whatever is to be said must be said now, I will ask the indulgence of the committee and express the hope that it will bear with me as best it can while I present arguments which may to some extent show the reasons upon which rest the law as it exists to-day, and present such facts to the committee of the action of the carriers in their attempt to meet the reasonable demands of the public. In closing I shall urge the committee, the bankers, the consignees, and the shippers to be as fair, just, and liberal to the carrier as they have been to those interests in the effort to meet their demands. If this legislation is to pass, we hope that they will be willing to share the burden that otherwise would be thrown upon the carrier alone by such legislation.

Mr. Chairman, the railroads carry an immense volume of commerce annually. The facts stated by Mr. James two weeks ago that there was transported twenty-five thousand million dollars in value of commerce in this country annually, of course, does not apply exclusively to the railroads. A part of it was carried on our navigable streams, part of it through our lakes, and a part of it by the coast-wise trade. At the same time we must realize that the great bulk of this immense commerce was carried by the rail carriers.

When we consider the number of bills of lading that must have been issued as an incident to the carrying of that immense commerce by the railroads, and the further fact of the insignificant number of losses occurring either to the railroads, to the consignee, or to the holders of bills of lading, it shows that this vast business has been transacted by agencies of intelligence, integrity, and honesty, fully equal, if not superior, in all those elements than can be shown by any other business of a similar character within the limits of the country.

Our friends came here session after session, and they pressed the question before every committee, that unless this bill was passed the movement of the great staple crops of this country would be

seriously affected and, further, that it would be impossible to finance the movement of those crops. What has been the result of a failure to pass this bill, as tested by experience of the last three years? We find that the crops have moved as promptly, as regularly, and with as little inconvenience as they have ever moved. During the last year of the movement of the great cotton crops, from the 1st day of September to the 15th day of February of this year, 7,440,668 bales of cotton were moved, almost double the volume moved in 1909, and at least one-third greater than that in 1910.

I congratulate the country and I congratulate our friends that they were mistaken in their predictions. While I call attention to these facts, Mr. Chairman, it is not with the purpose to oppose just and responsible legislation with reference to this subject. A majority of the railroads which I represent assume the position that although this legislation, perhaps, is not necessary, it would not be advisable to oppose it, if satisfied that an intelligent public sentiment believes that the commercial interests of the country demand its passage by Congress. If such legislation is formulated by this committee, the carriers will seek and urge at the hands of the committee that every safeguard that is possible shall be thrown around such legislation for the protection of the carriers under the liabilities which will be imposed upon them; that its provisions shall recognize their right to a fair compensation for the insurance which they make of the guaranteed bills that will be just to the carrier, to the shipper, and to the public.

If that burden is to be imposed, Mr. Chairman, in behalf of the great commercial interests of the country, to carry out what you believe to be a wise public policy, with the purpose of stimulating the development of its business and commercial interests, then the country should assist in bearing a portion of the burden incident to that legislation. The whole burden should not be thrown on one class or on one industry, but it should be distributed fairly and justly between all benefited by the new rule of conduct.

Mr. Chairman, I want to present to this committee the reason for the rule of law announced by the Supreme Court in 18 Howard, 187, and subsequent decision that the carrier is not liable on a bill of lading signed by an agent when the goods have not been delivered. I have been partially induced to do this by a question of the distinguished Senator sitting at my left, who asked Mr. Thom yesterday whether he thought the decision in 130 United States was a fortunate or an unfortunate decision. If I had been asked that question by that distinguished Senator, for whom I have the very highest admiration, I would have answered and said: "The decision, whether fortunate or unfortunate, was bound to have been made as it was announced by the court or the courts would have assumed to change a rule of conduct which alone is within the power of Congress."

In giving such an answer I admit the burden is upon me to show to the Senator and to the committee that any other decision than that rendered would have been opposed to those principles of law controlling this question known to the English-speaking nations from their earliest history.

I will ask the committee to bear with me while I shall endeavor to sustain this statement.

Mr. Chairman, I think I may safely say that there has been no change in law as announced in 130 United States (the *Freelander* case), either in English jurisdiction or in the Federal jurisdiction upon this question. The principle of the law on which that decision is based rests upon three distinct principles of agency and two distinct principles affecting the right of common carriers:

First. An agent of a carrier executing a bill of lading on behalf of his principal, without the receipt of the goods for immediate transportation, is acting in violation of his instructions and without authority.

Second. That the agent is not clothed in the execution of such a paper with even an apparent authority to "do an act so utterly outside of the scope of his employment and the carriers' own business."

Third. The law presumes this want of authority on the part of the agent is known to the business world.

Fourth. That the rule of law is well settled that the liability of a common carrier does not attach until the delivery of the goods for immediate transportation.

Fifth. A bill of lading is of two parts, the receipt for the goods described and the contract to safely carry and deliver. As a receipt, it is like all receipts of every description, open to explanation and rebuttal of the facts stated therein.

Now, Mr. Chairman, these are all well-known principles, and no one is more familiar with them than the members of this committee.

A decision that refused to apply those principles without the authority of legislative enactment, where they had been applied and had controlled the rights and liabilities under this particular paper for centuries, would have been legislation upon the part of the courts, and if it is within the power of Congress to change this rule, it is in the exercise of its legislative power alone that this law can be modified or rejected. The courts can only declare what is the law; the legislative body must make the rule of conduct.

Mr. Chairman, I do not propose to read all of the decisions which I shall refer to, but I ask to insert them in the record. I shall only briefly call attention to each as I proceed.

The first case that came before the Supreme Court involving the question of the liability of a carrier where the goods had not been delivered was the case of the schooner *Freeman v. Buckingham* and others (18 How., 189).

Mr. Justice Curtis, in speaking for the unanimous court, said:

The first and most obvious view which presents itself is that the claimant in this case is not personally liable on these bills of lading. The master who signed them was not his agent, and they created no contract between him and the consignor or consignee, or any third person who might become their holder. (Abbot on Shipping, 42 and note, 57 and note.)

Mr. James, in his discussion of this case, said that the Supreme Court followed blindly the case of *Grant v. Norway*, decided in England, which indorsed the same principle.

If you gentlemen will take that case and read the reasoning of the learned judge (Mr. Justice Curtis), you will reach the conclusion that every statement of his opinion of the law applicable to the facts of the case will be approved by your judgment as to their accuracy and correctness; that under these well-settled principles no other conclusion than announced could have been reached. Nor did he follow

blindly any decision, but rested his conclusions upon the admitted principles of agency and the character and functions of public carriers.

I will ask your indulgence to read this decision found in 18 Howard, as it is the foundation of all the six other decisions. It is found on pages 190 and 191:

There can be no implication that the general owner consented that false pretenses of contracts, having the semblance of bills of lading, should be created as instruments of fraud, or that, if so created, they should in any manner affect him or his property. They do not grow out of any employment of the vessel, and there is as little privity or connection between him or his vessel and such simulated bills of lading as there would be between him and any other fraud or forgery which the master or special owner might commit.

Nor can the general owner be estopped from showing the real character of the transaction by the fact that the libelants advanced money on the faith of the bills of lading, because this change in the libelant's condition was not induced by the act of the claimant, or of any one acting within the scope of an authority which the claimant had conferred. Even if the master had been appointed by the claimant, a willful fraud committed on a third person, by signing false bills of lading, would not be within his agency. If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound; and the reason is because the bill is signed by one not in privity with the owner.

Note the distinct principle upon which the court rests this decision:

But the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more an apparent unlimited authority to sign bills of lading than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship when, in case of disaster, his power of sale arises. But the authority in each case, arises out of, and depends upon, a particular state of facts. It is not an unlimited authority.

No one can deny this to be a correct statement of the law of agency in the one case more than in the other; and his act in either case does not bind the owner, even in favor of an innocent purchaser, if the facts upon which his power depended did not exist; and it is incumbent upon those who are about to change their condition, upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends.

Though the law on this point seems to have been considered in Westminster Hall not to have been settled, when the eighth edition of Abbot on Shipping was published, in 1849, (Ab. on Sh., 325) we take it to be settled by the cases of *Grant v. Norway* (2 Eng. Law and Eq., 337); *Hubbersty v. Ward* (18 *ibid.*, 551); and *Coleman v. Riches* (29 *ibid.*, 323).

This was not the first time that this question has been passed on in the United States. The decision in this case refers to an earlier decision in the United States, the case of *Walter v. Brewer* (11 Mass., 99), decided in 1814, or 40 years before the decision in 18 Howard.

The case of *Lady Franklin* (8 Wall., 325) I shall only refer to briefly. In this case the error of the agent was in giving a bill of lading by a particular carrier when the goods were shipped through another carrier. The court, on page 329, uses the following language:

In this case the bill of lading acknowledges the receipt of so much flour, and is *prima facie* evidence of the fact. It is, however, not conclusive on the point, but may be contradicted by oral testimony.

The doctrine that the obligation between ship and cargo is mutual and reciprocal and does not attach until the cargo is on board or in the custody of the master has been so often discussed and so long settled that it would be useless labor to restate it or the principles which lie at its foundation. The case of the Schooner *Freeman v. Buckingham*, decided by this court, is decisive of this case. It is true the bill of lading there was obtained fraudulently, while here it was given by mistake; but the principle is the same, and the court held in that case that there could be no lien, notwithstanding the bill of lading.

The court say there was no cargo to which the ship could be bound, and there was no contract for the performance of which the ship could stand as security.

In the case of *Delaware* (14 Wall., 601-602), which arose by reason of the loss in storing the goods on deck instead of under cover, the court enters fully into the discussion of the nature of the bill of lading, sustaining fully the views of the court, as expressed in the schooner *Freeman* (18 How.), holding that so far as it is a receipt it is merely prima facie evidence of the payment or delivery of the goods, and may be contradicted by oral evidence. Justice Clifford concludes the discussion, on page 602, in the following language:

Bills of lading when signed by the master, duly executed in the usual course of business, bind the owners of the vessel if the goods were laden on board or were actually delivered into the custody of the master, but it is well-settled law that the owners are not liable if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board or delivered into the custody of the carrier or his agent.

The most interesting and important decision is the case of *Pollard v. Vinton* (105 U. S., 7). This is a case in which the second John Marshall of the Supreme Court delivered the opinion—I mean Mr. Justice Miller. He discusses every question involved in the decision with clearness of statement and grasp of the fundamental principles underlying the doctrine of agency, and finally fully sustains the views expressed in the case of 18 Howard and the previous decisions in Wallace.

Senator CLARKE. That is also a boat case, is it not?

Mr. FAULKNER. Yes; a boat case. But, Senator, you will remember that the Supreme Court of the United States, speaking through Mr. Justice Matthews, expressly decided that the principles applied to land carriers equally with the steamship and boat carriers.

Senator CLARKE. Yes; that is one of my complaints of the court, that it does not keep up with the times.

Mr. FAULKNER. In the case decided by Chief Justice Miller he says, in speaking of the character of a bill of lading:

It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.

On page 9, in discussing the powers of an agent and the functions of a carrier, he says:

Before the power to make and deliver a bill of lading could arise, some person must have shipped goods on the vessel. Only then could there be a shipper, and only then could there be goods shipped. In saying this we do not mean that the goods must have been actually placed on the deck of the vessel. If they come within the control and custody of the officers of the boat for the purpose of shipment, the contract of carriage had commenced, and the evidence of it in the form of a bill of lading would be binding. But without such a delivery there was no contract of carrying, and the agents of defendant had no authority to make one.

They had no authority to sell cotton and contract for delivery. They had no authority to sell bills of lading. They had no power to execute these instruments

and go out and sell them to purchasers. No man had a right to buy such a bill of lading of them who had not delivered them the goods to be shipped.

This is a very brief reference to this case; it merits a careful reading:

In the case of the *Iron Mountain Railroad Co. v. Knight* (122 U. S., 79), Mr. Justice Matthews, in deciding the case fully sustains the case of 18 Howard, and the reasoning in *Grant & Norway*, using on page 86, the following language, in referring to the English case:

The ground of that decision, according to my view, was not merely that the captain has no authority to sign a bill of lading in respect of goods not on board, but that the nature and limitation of the captain's authority are well known among mercantile persons, and that he is only authorized to perform all things usual in the line of business in which he is employed.

On page 87, in speaking of the doctrine announced in the case of the schooner *Freeman and Pollard v. Vinton*, he said:

And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea.

Why should not the carrier on land and water, as to the responsibilities and liabilities under a bill of lading, stand on the same footing? We have inherited the principles, the forms, and the liabilities of a bill of lading from the maritime law. It originated under that jurisdiction, and as our system of transportation developed the same rules were applied to the same character of business whether the traffic moved by land or water.

In the case of *Friedlander v. Texas, etc., Railway Co.* (130 U. S., 416), the direct question of the rights of a bona fide holder without notice under a bill of lading, where the property was not delivered to the carrier, but the bill signed by its agent, was passed upon by the court in an opinion delivered by Mr. Chief Justice Fuller.

In discussing a bill of lading, the court, on pages 423 and 424, uses this language:

Bills of exchange and promissory notes are representatives of money, circulating in the commercial world as such, and it is essential, to enable them to perform their peculiar functions, that he who purchases them should not be bound to look beyond the instrument, and that his right to enforce them should not be defeated by anything short of bad faith on his part. But bills of lading answer a different purpose and perform different functions. They are regarded as so much cotton, grain, iron, or other articles of merchandise, in that they are symbols of ownership of the goods they cover. And as no sale of goods lost or stolen, though to a bona fide purchaser for value, can divest the ownership of the person who lost them or from whom they were stolen, so the sale of the symbol or mere representative of the goods can have no such effect, although it sometimes happens that the true owner, by negligence, has so put it into the power of another to occupy his position ostensibly as to estop him from asserting his right as against a purchaser who has been misled to his hurt by reason of such negligence.

The court, on pages 425 and 426, in giving the reason for this rule, states:

It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon *Friedlander & Co.* The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only, and held to rigid responsibility as such. Easton, disregarding the object for which he was employed, and not intending by his act to execute it, but wholly for a purpose of his own and of

Lahnstein, became particeps criminis with the latter in the commission of the fraud upon Friedlander & Co., and it would be going too far to hold the company, under such circumstances, estopped from denying that it had clothed this agent with apparent authority to do an act so utterly outside the scope of his employment and of its own business. The defendant can not be held on contract as a common carrier, in the absence of goods, shipment and shipper; nor is the action maintainable on the ground of tort. "The general rule," said Wiles, J., in *Barwick v. English Joint Stock Bank*, (L. R. 2 Ex., 259, 265) "is that that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." (See also *Limpus v. London General Omnibus Co.*, 1 H. & C., 526.) The fraud was in respect to a matter within the scope of Easton's employment or outside of it. It was not within it, for bills of lading could only be issued for merchandise delivered; and being without it, the company, which derived and could derive no benefit from the unauthorized and fraudulent act, can not be made responsible. (*British Mutual Banking Co. v. Charnwood Forest Railway Co.*, 18 Q. B. D., 714.)

The law can punish roguery, but can not always protect a purchaser from loss, and so fraud perpetrated through the device of a false bill of lading may work injury to an innocent party, which can not be redressed by a change of victim.

The case of the *Missouri Railway v. McFadden* (154 U. S., 165), in which the opinion was delivered by Mr. Justice White, presented a somewhat different question. It was a case in which a shipper had delivered his cotton to the compress company, and while in the possession of that company the agent had given a bill of lading with the understanding that when it was compressed it was to be delivered to the railroad company. While in the possession of the compress company the building of the compress company burned down and the cotton was destroyed. The question arose, Who was to suffer the loss? The railroad company or the party who had received the bill of lading which had been signed by the agent of the railroad company? The first question to determine was, Had there been a delivery to the railroad company? If so, then, of course, the company would have been liable. Mr. Justice White, in discussing the question, on page 160, said:

The elementary rule is that the liability of a common carrier depends upon the delivery to him of the goods which he is to carry. This rule is thus stated in the textbooks: "The liability of a carrier begins when the goods are delivered to him or his proper servant authorized to receive them for carriage." (Redfield on Carriers, 80.) The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other; and until it has become imposed upon the carrier by a delivery and acceptance he can not be held responsible for them.

The court then proceeds to state:

This doctrine is sanctioned by a unanimous course of English and American decisions.

The court then proceeds as to third parties holding the bill of lading without notice and for value, and fully approves the doctrine laid down in *Pollard v. Vinton* and in case of the *Lady Franklin*. On page 163 the court closes the discussion with the following statement, referring to the rights of third parties for value without notice:

The rule thus stated is the elementary commercial rule. Indeed, in the case last cited (referring to the *Lady Franklin* case) this court expressed surprise that the question should be raised. These views coincide with the rulings of the English courts.

That is the last of the Supreme Court decisions, covering a period of nearly 60 years, since this doctrine was declared and settled so far as the Federal courts could determine it.

I shall only refer to two cases decided by the State courts. I refer to one of these because of the views expressed by the court in reference to the importance of following the Federal ruling.

In the case of the *National Bank of Commerce v. The Chicago, etc., R. R. Co.* (44 Minn., 224), Mitchell, J., in delivering the opinion of the court, after defending the soundness of the doctrine itself, advances the following argument in favor of the adopting by the court of the doctrine of the English and Federal courts. He said:

It is * * * to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. * * * Moreover, on questions of general commercial law, the Federal courts refuse to follow the decision of the State courts, and determine the law according to their own views of what it is.

A recent decision has been made, after a most elaborate review of the authorities, by the Supreme Court of the State of Washington, found in 85 Pacific Reporter, 33, *Roy & Roy v. The Northern Pacific Railroad Co.* This case was decided in 1906, and it reaches the same conclusion reached by all the Federal courts upon this question.

In examining as to what was the condition of the law of England—the nation from which we have drawn most of our laws, except where modified by statute or court decisions—the first case that I have been able to find that passed upon the principle was the case of *Lickbarrow v. Mason* (2 T. R., 77), decided by Buller, J., in which the court announced the doctrine in accord with the Federal decisions, but held that the party who signed the bill of lading in fraud of the fact that there were no goods on board could be estopped to deny the fact that the goods were not delivered.

This is the first decision that I have been able to find bearing upon the question.

Subsequently, the case of *Grant v. Norway* (found in 2 Eng. Law and Equity, 340 and 341) was decided. That case disclosed the doctrine on the same lines as the decisions in the Federal courts.

My friend, Mr. James, criticizes that decision very severely in his remarks before this committee. He said it was rendered by a court of inferior jurisdiction; he expressed surprise that the case was not appealed; and he assumed that it must have been because the defeated party was bought off, or some other similar reason for that failure. The sensible and common-sense reason which controlled the counsel from taking an appeal was that this was a court of general jurisdiction, presided over by three of the most intelligent judges of England—Mr. Cresswell, Mr. Williams, and Mr. Jervis. The principles upon which they founded their judgments were so well recognized as the law of the land that, like any good lawyer who is on the losing side, he felt it would be useless to appeal to Parliament.

The reasons for the decision by this learned court are as follows:

It is not contended that the captain had any real authority to sign the bill of lading unless the goods had been shipped, nor can we discover any ground on which a party, taking a bill of lading by indorsement, could be justified in assuming that he had authority to sign such a bill, whether the goods were put on board or not. If, then, from usage and the general practice of shipping masters it is generally known that the master derives no such authority from his position as master, the case must be considered as if the party taking the bill of lading had notice of the express limitation of authority; and in that case, undoubtedly, he could not claim to bind the owner by the bill of lading. It resembles the case of goods or money taken up by the master on

the pretense that they are needed for the ship, when, in fact, they were not; or a bill of exchange accepted or indorsed by procuration when no such agency existed. Procuration gives notice that the agent is acting with a special and limited authority, and therefore the party taking such bill must establish by evidence his authority.

The English and Canadian authorities sustaining this view of the law are collected in note 1 to vol. 4, 2 ed., A. & E. E. of Law, 533.

The commercial interests at once became active in the matter—the same interest we see here—and they appealed, saying: “We will go to Parliament; we will go to a legislative body whose powers are unlimited; we will demand the right to have protection thrown around bills of lading; and will fix the liabilities of the carrier by statute.”

They appealed to Parliament. When Parliament proceeds to frame a law, the effects of which would be to change a well-recognized right and to annul a principle that had been adhered to for centuries, it acts with great care and caution, as is shown by the one it passed on the demand of the commercial interests of England. Did they pass such a law as you are asked to pass in response to this demand from the commercial interests? No, gentlemen; they passed the following act:

[Chapter 111, 18 and 19 Victoria, enacted on the 14th of August, 1855.]

Whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a bona fide holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

I. Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

II. Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement.

III. Every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel, shall be conclusive of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

The first section of the statute authorized a consignee or indorsee of a bill of lading to institute a suit in his name as though the contract had been made with such consignee or indorsee. The second section, which is in direct conflict with the provisions of S. 4713, provided that nothing in this act should prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner.

The third section, following the decision of Buller, J., in *Lickbarrow v. Mason* (2 T. R., 77), provides: “A bill of lading in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment.” Now, note the qualification of this doctrine

announced by the statute, not that it should be conclusive against the owner or carrier, but, in the language of the statute, "as against the master or other person signing the same."

An examination of the proviso of the third section will convince the committee of the very careful manner of framing the laws on so important a subject as this by the British Parliament.

This section gives to the consignee or indorsee for value, without notice that the goods have not been actually delivered to the carrier, a right to recover their value as against the master or the person signing the bill, but it does not stop here, it qualifies that liability in its proviso to the section, by providing that the master, or other person, so signing may exonerate himself in respect to such misrepresentation, first, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or of some person under whom the holder claims. This last ground of exemption for liability is a very broad one as to third persons, and yet it is based upon a true public policy and declares that in this character of transactions the holder stands in the shoes of the shipper under whom he claims, and that the defense against the one should equally be a defense against the others.

Another interesting matter of history—if you gentlemen will bear with me for a few moments—is this: I hope to convince the committee that the Supreme Court was constrained by the public policy declared by Congress, if for no other reason, to adhere to the English doctrine.

There is not a legislative declaration by the Congress of the United States from the beginning of its history to the present time that does not sustain, approve, and conform to the decisions of the Federal courts on this subject. If the courts have been wrong, Congress has been wrong. No one can deny that when the Harter Act was passed, referred to by Mr. James, that Congress had absolute and unlimited jurisdiction over the subject of bills of lading provided for by that act. What did they do? When they passed that act, providing for a bill of lading for maritime purposes, they followed the doctrine as announced by the Supreme Court of the United States. This act is found in the Twenty-seventh Statutes at Large, page 445. I will only quote the part of it which refers to the question that we are discussing:

of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such documents shall be prima facie evidence of the receipt of the merchandise therein described.

That is the law as declared by the Supreme Court; that is the doctrine of the Federal courts. It is prima facie evidence, when signed by an agent of the company, that the goods were delivered; but it is a fact which is open—as all other receipts between every other person in the United States is open—to contradiction even by parol evidence.

In the case of the *Isola Di Procida* (124 Fed. Rep., 944) the court, construing this act, which certainly was very plain upon its face, held:

The provision of the statute that a bill of lading should be prima facie evidence of the receipt of the merchandise therein described adds nothing to the general rule of law previously existing, and the rule previously established in the Federal court that a false bill of lading is not binding on the owner or the ship still remains the law.

What has been the action of Congress under the interstate-commerce act? Wherever the question of property and liability of the

carrier is mentioned in that act, it carefully limits the provision to the condition on the receipt of the property—"after receiving the property." Congress studiously avoided the use of any language that could be construed as seeking to regulate the conduct of the carrier before the actual receipt by the carrier of the property. Congress has always recognized the principle that there must be commerce before regulation; that the functions, duties, and obligations of a carrier begin at the time of the delivery of the property for immediate transportation; that its obligations do not attach as a common carrier until the delivery of the property.

When Congress passed the Carmack amendment the same policy controlled it. That amendment reads as follows:

That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor.

In this provision the true principle upon which should rest the carrier's liability is declared—on receipt of property the bill of lading to be issued. Congress was fully aware of the decisions of the Supreme Court that there could not be a liability upon the common carrier until the delivery of the property for transportation had been made, and in all of its legislation that I have been able to trace I find it has adhered strictly to the rule announced by the Federal courts.

Senator POMERENE. What is the date of that act to which you refer—the Carmack Act?

Mr. FAULKNER. It was after I left the Senate.

Senator CLARKE. In 1906?

Mr. FAULKNER. There have been two decisions by the Supreme Court on the Carmack amendment. Of course this question was not involved in either, nor did they decide some of the very important questions that we hoped might be passed upon in that case. The court held that where the carrier voluntarily had taken upon himself to transfer goods from a point in one State to a point in another, issuing a bill of lading to that effect, by that voluntary act the carrier constituted the connecting carriers his agent, and the initial carrier was liable.

The law that the carrier is only liable when the property has been received by it is undisputed in England, is settled in the Federal courts, and in a majority of the States. The reasons which have influenced this rule of conduct have been laid before you. The policy as declared by Congress in the enactment of the acts dealing with this question has been called to your attention. I have not submitted the line of argument for the purpose of antagonizing the passage of a bill upon this subject that in the wisdom of the committee may be deemed fair, just, and equitable to all interests. I have submitted this argument with the hope of convincing you that the carriers have acted upon the belief that this would continue to be the permanent law of the country, resting, as it does, on seven decisions of the Supreme Court; that if in the judgment of Congress there is to be a change of this rule, upon the faith of which rates have been established, the carrier on whom the burden will fall should receive the consideration of this committee in the framing of the law that the burden may be equitably distributed to all and not to a single interest.

Mr. Chairman, I hope to present the action of the carriers to the committee in a more favorable light than was done by some of the witnesses who have advocated this bill.

Gentlemen, you are all aware of the time, study, and labor given to the framing of a uniform bill of lading. The bill of lading—I think they called it the bill of lading of 1904—became so very objectionable in the way in which the traffic was hauled under it that the commercial interests, the bankers and the railroads, all admitted that something must be done to put the movement of commerce under a bill of lading that would be uniform and have some credibility attached to it. The commission felt that they could not go very far in the matter under the authority of the act regulating commerce, but promptly indicated its desire to cooperate with all interests. After some years of negotiation and frequent conferences, what is known as the uniform bill of lading was approved by all conflicting interests and sanctioned by the commission. The order bill of lading is on yellow paper. The shipping order, you see, is on blue paper; the memorandum is also on blue paper, so as to distinguish these two papers and forms from the original order bill of lading, which carries the liability and which is frequently used as a collateral in obtaining funds by the shipper or others.

Gentlemen, even with these distinctive features it has not made the bankers and others taking these order bills of lading careful in accepting such bills. By referring to the hearings of this committee during the last regular session of Congress, Mr. Mullin, a witness, gives a list of a number of order bills of lading that were not signed by the agent, where the banker had accepted order bills of lading on a straight bill of lading form. Errors of this kind were not noticed by the banker who discounted the paper and sent it on for collection. This carelessness became so annoying to the railroads that you will find in his evidence that the carriers were compelled to send a public notice to the bankers in the Delaware & Hudson Railroad Co.'s territory, appealing to them to be more careful in the acceptance of these bills of lading, and to see that they conformed with the rules of the uniform bill, and thus save any question of the liability of the railroad.

The straight bill of lading is on white paper. If I had the time to present to you the orders issued by the carriers, of instructions to their agents upon every question that could arise on these bills, and the efforts made to educate the agents in handling the traffic under them, you would realize that the carriers had done their full duty in this respect. There were six different circulars sent to the agents of the Delaware & Hudson road, with the view of making them familiar with the order bill of lading. Other roads did the same.

The order bill was put into effect, I believe, in 1909. That order bill of lading embraces every provision that I recall that is now in this bill except one—the liability of the carrier where there has been no receipt of property. It requires the bill to be made out to the order of; that the goods shall not be surrendered under an order bill of lading without surrender of the bill. If the carrier surrenders the property and leaves outstanding the bill it is responsible to the holder. The provisions as to a straight bill of lading are the same as in the uniform bill of lading. It further conforms with S. 957 in the last section as to alterations.

By consent the carriers have changed the law in that respect. Although the order bill of lading has been altered by the insertion in it of a material fact, yet notwithstanding that fact the carriers consent to be held themselves liable, according to the original tenor and effect of the bill. This is an important concession by the carriers in their efforts to preserve and protect the order bill of lading in the hands of the holder. In the uniform bill the carriers made many other concessions. They have consented to further changes, increasing their liability under the condition attached to the bill of lading, both order and straight.

These suggestions but illustrate the fact that the carriers have been trying to meet the conditions that confront them in the interest of the shippers and of the public as far as possible.

In agreeing to this bill of lading the railroad carriers, with a view of meeting the wishes of the bankers, shippers, and consignees, agreed to many amendments of vital importance to the public in the uniform bill or lading which was not found in the bill of lading previously used. To make this bill binding upon the carrier, they filed it as a part of their tariffs to relieve all questions of doubt as to the power of the commission.

The differences between the old bill and the uniform bill may be briefly stated as follows:

The order bill of lading is required to be printed upon yellow paper, and no duplicate is to be issued. The word "order" is to be printed or engraved in conspicuous letters upon the face of the bill.

Upon its face, it is provided that the goods under an order bill of lading shall only be delivered upon the indorsement and surrender of the bill, and that the word "original" shall be prominently printed on it.

The order bill of lading is to be signed by the shipper as well as the carrier.

The former bill provided that no carrier should be liable for loss or damage by causes specified, and only impliedly assumed liability for loss or damage from other causes. The present bill provides "the carrier shall be liable for any loss or damage, except as hereinafter provided."

The liability for fire from any cause is now assumed until 48 hours after the property has reached its destination ready for delivery. This extends the liability under the former bill of lading.

The present bill makes the carrier assume the burden of proof to show freedom from negligence.

The carrier is prohibited from diverting freight from specified route, except in cases of physical necessity.

The uniform bill of lading requires the carrier to assume liability for damage to property carried in open cars, resulting from fire and other negligence.

The limitation as to the amount and time of presentation of claims has been enlarged.

The value of the property at the place of shipment determines the measure of damages, and the claims may be presented in four months.

As to perishable property, carriers are relieved from responsibility for "a defect or vice in the property," and not for loss growing out of the inherent nature of the property.

These are very valuable concessions, made in the conferences, extending over three years, between all the parties in interest, and the instructions issued to all agents of the carriers, calling their attention to the importance of these amendments to the bills of lading, have been very full and exhaustive.

The shipping order and memorandum of the order bill of lading are required to be on blue paper, as distinguished from the original. The straight bill of lading is required to be upon white paper, as well as the shipping order and the memorandum, and on the face of it the words "not negotiable" are to be printed.

MR. FAULKNER. There was one bill I wanted simply to put in here, but I do not see it.

I want to refer only to Mr. Williston's statement a moment before the committee.

THE ACTING CHAIRMAN. Have you lost something, Senator?

MR. FAULKNER. No; but it is not here.

THE ACTING CHAIRMAN. You can reserve the right to insert it at any time.

MR. FAULKNER. I will state it now so that it can be put in connection with what I have said. I would like to file as a part of my statement, and as a part of the history of the period, that which may be of interest in the future to members of the committee in considering this question, the form gotten up and adopted by the Southern Railway Co. in reference to shipment of cotton during the last two years. I think it will be a matter of interest, and in considering this question it may be useful to the committee.

THE ACTING CHAIRMAN. If you will hand it to the stenographer it will be inserted at this point.

The paper referred to is as follows:

Auditor's Circular No. 210.

Circular No. 2649.

SOUTHERN RAILWAY COMPANY.

RULES AND INSTRUCTIONS TO GOVERN THE ISSUANCE OF EXPORT BILLS OF LADING FOR COTTON, AND OF BILL OF LADING SIGNATURE CERTIFICATES IN CONNECTION THEREWITH.

To agents:

1. Agents and other representatives of this company are instructed not to sign export bills of lading for cotton until they have knowledge that the cotton covered thereby is actually in possession of this company, except that such bills of lading may be signed upon loading certificates issued by duly authorized representatives of warehouses or compress companies that have executed usual contract and bond with this company, certifying that cotton is loaded in the cars designated by initials and numbers on the loading certificates; but not otherwise. Export bills of lading for cotton must be signed only by agents of the company or by other representatives of the company who are duly authorized so to do.

2. The data in bills of lading must be inserted with pen and ink or by typewriter, except as to the number of bales and marks in the original bill of lading, which must in each case be written with pen and ink. There shall be no additions, erasures, or changes in bills of lading.

3. Export bills of lading must be issued in serial numbers, beginning with No. 1 at each issuing station on the first of September of each year.

All copies of bills of lading must bear the same number as the original.

Bills of lading, that is the originals and each copy thereof, must be dated the day the cotton is received for shipment. The inland rail rate, the wharfage and transfer charge at the port, if any, and the ocean rate must be shown separately.

4. Only one original bill of lading must be issued for each shipment, but as many copies as are reasonably required may be issued, provided that the copies are plainly endorsed with pen and ink "Copy, not negotiable." The word "One" must be inserted in the blank space in the last paragraph of bills of lading, referring to the number of copies affirmed to. Two copies of each bill of lading must be forwarded, on the date of issue, to the agent of the water carrier at the port of export in case of direct shipments, or to the port of transshipment in case of indirect shipments. At the same time, two copies must be forwarded to the agent of the rail carrier at the port of export in case of direct shipments, or to agent at the port of transshipment in case of indirect shipments.

5. The shipper is required to accept the conditions of the bill of lading by affixing his signature, or the signature of his authorized representative, to the original and one copy. The copy accepted by the shipper will be forwarded to the auditor of freight accounts at Washington, D. C., with duplicate bill of lading signature certificate attached as hereinafter referred to.

The acceptance of the shipper as referred to in this rule shall appear on the lower margin of the bill of lading below the signature of the carrier's agent in the following form:

"Accepted.

"Shipper, as owner or agent for owner."

6. The originals and copies of bills of lading covering cotton consigned to Manchester, England, must be endorsed as follows: "Canal dues to be paid by consignees."

7. Designated signature certifying agents of this company other than those agents authorized to sign bills of lading, will be furnished with a supply of certificates, Form 402, reading as follows:

(To be attached to order bills of lading for export cotton when issued by agents of this company.)

SOUTHERN RAILWAY COMPANY.

Bill of lading signature certificate No. —.

The Southern Railway Company hereby certifies:

That ——— is its regularly appointed ——— agent at ——— and as such is authorized to sign bills of lading in accordance with the regulations of this company, and that the signature on the attached order notify bill of lading No. —, dated — (place of issue) —, (date) —, 191—, covering — bales of cotton marked — is his signature.

(Date) —, 191—.

These certificates are issued in book form with original, duplicate, and stub, and numbered consecutively; the signature certifying agent receiving them will be required to account for all such certificates received, issued, and on hand.

Signature certifying agents must keep a full record of each transaction on the stub of each certificate issued. The stub must show reference to the number of the corresponding bill of lading. Spoiled certificates must be immediately cancelled and returned to the auditor of freight accounts, with report, and the stub so endorsed. Certificates will be issued to signature certifying agents by the stationer at Richmond, Va., upon whom requisitions must be made for them. They must be accounted for and checked in the same manner as passenger tickets.

Signature certifying agents will be furnished an official signature certifying stamp, to be used as provided for in rule 8.

8. When a bill of lading has been properly filled out, and signed by the authorized agent of this company, the signature certifying agent authorized to issue bill of lading signature certificates shall, after satisfying himself that signature of agent appearing on the bill of lading is genuine, fill out and sign a certificate attaching, with mucilage or paste, the original certificate to the original bill of lading and the duplicate certificate to a copy of the bill of lading. He must then place an impression of his official stamp partly on the certificate and partly on the bill of lading to which the certificate is attached, in such manner that any tampering with, or irregularity, will be readily apparent. On the date of issuance the signature certifying agent must forward to the auditor of freight accounts the copy of the bill of lading (which must be the copy signed by shipper—see rule 5), to which the duplicate certificate is attached.

The number of the corresponding bill of lading signature certificate shall be stamped or written at the top of the original and each copy of all bills of lading issued, in the following form: "Bill of lading signature certificate No. —."

9. Agents must use serial numbers for export cotton engagements separate from the engagements for other export traffic; begin with "Cotton engagement No. 1," September 1st of each year.

10. A new stock of export bills of lading will be issued in due course and will provide proper spaces for inserting the number of the bill of lading signature certificate and the shipper's acceptance.

Below is a list of the points on this line at which export bills of lading for cotton will be issued, and the names of the agents authorized to issue bill of lading signature certificates:

NORTH CAROLINA.

Charlotte.....	{C. V. Plamer.
	{W. P. Lester.
Goldsboro	J. W. Powell.
Greensboro.....	{G. G. Thompson.
	{W. F. Blair.
Raleigh	{J. H. Andrews.
	{J. O. Jones.

SOUTH CAROLINA.

Charleston	{H. M. Cobb.
	{H. A. Parker.
Columbia.....	{D. Cardwell.
	{L. M. Ansley.
Greenville	{A. E. McBee.
	{W. R. Taber.
Spartanburg....	{B. Z. Ruff.
	{F. B. Pinson.
Sumter	J. R. Clack.

GEORGIA.

Athens	{Paul Pinkerton.
	{E. E. Lamkin.
Atlanta	{B. S. Barker.
	{C. S. Powers.
Augusta	{A. H. Acker.
	{R. S. Brown.
Brunswick	W. J. Mangham.
Columbus	{W. H. Caffey.
	{B. F. Newman.
Elberton	S. J. Bryan.
Eastman.....	{Thos. Prince.
	{Scott Edwards.
Hawkinsville..	{J. H. Caldwell.
	{E. W. Coney.
Macon.....	{J. E. Rickenbaker.
	{G. R. Petit.
Rome.....	{J. J. Seay.
	{C. D. Whitworth.

GEORGIA—continued.

Savannah.....	{C. E. Gay.
	{J. C. Hext.
Toccoa.....	Rush Herndon.

ALABAMA.

Anniston.....	{W. G. Crutchfield.
	{Miss Winnie Roberts.
Birmingham ..	{R. L. Simpson.
	{T. L. Jennings.
Decatur.....	{W. E. Young.
	{Richard T. Bracken.
Demopolis	John C. Webb, jr.
Greensboro	H. C. Childers.
Marion.....	T. M. Wallace.
Mobile.....	{J. B. Erwin.
	{G. E. Kirkland.
Selma.....	{M. P. Webb.
	{T. H. Miller.
Sheffield.....	{E. H. Craig.
	{E. M. Jordan.
Uniontown	J. P. Brown.

MISSISSIPPI.

Columbus	{J. L. Cox.
	{T. A. H. Wood.
Corinth.....	{M. P. Russell.
	{A. B. Meador.
Meridian	{Morgan Richards.
	{E. R. Lowry.

TENNESSEE.

Memphis.....	{J. J. Branch.
	{H. P. Wade.

VIRGINIA.

Norfolk	{J. D. McCarrick.
Pinnars Point..	{H. P. Friedman.

Where two signature certifying agents are shown at the same point, the signature certificates and stamps will be charged to the representative first named, who will be held generally responsible for the care of the certificates and stamps and the proper observance of these instructions. In the absence of the signature certifying agent first named the alternate certifying agent will issue the certificates and sign them with the name of the certifying agent first named "per pro" his full name and initials. For example: At Charlotte Mr. Lester will sign Mr. Palmer's name as follows: "C. V. PALMER, Per pro W. P. Lester."

Issued August 26, 1910.

Effective September 1, 1910.

H. H. LAUGHTON,
Auditor, Washington, D. C.

RANDALL CLIFTON,
General Freight Agent, Atlanta, Ga.

Mr. FAULKNER. Mr. Williston frankly stated that there were three evils to be corrected by the passage of this bill.

First. The evil in regard to the contract between the shipper and the carrier, which depends upon the form of the bill of lading.

He answers that himself by the following statement:

Now, that evil has been practically eliminated by the uniform bill of lading.

So that end is cured by the consent of all interests.

The second reason assigned by him arises in regard to the purchase by third persons not in contractual relation with the carrier. He admits as to this that the uniform bill of lading partially removes this evil, and to go further would perhaps render the act unconstitutional in dealing with the rights and interests of third parties.

Consequently, he advises the committee very frankly that for that reason he prefers the short bill, S. 957, instead of the State bill.

The third difficulty is the one sought to be removed by the fourth section of Senate bill 957, which provides for an estoppel in favor of the consignee or holder for value without notice of the receipt of the property, as well as the estoppel where a duplicate original bill has been issued.

It appears that the only question that can on the face of the bill be in dispute is that which is embraced in the fourth section. Shall the carriers be compelled to assume the responsibility of the act of a supposed agent in forging their name—for that is the effect of it in law—to a bill of lading, the agent acting without authority, and not clothed even with an apparent authority to execute the bill, the rule being that only upon the receipt of the property for transportation does the condition exist which authorizes the person to act as agent, and this rule is fully known to the public.

Mr. Chairman, I had intended to suggest for your consideration a number of objections to this proposed legislation, but I shall refrain from doing so at this time, as I do not desire to appear in the attitude of one opposing a fair and equitable measure.

Mr. Chairman, there is one suggestion that I will submit for your consideration, but which I feel no obligation to urge. Congress has the power to regulate, almost without limit, all questions of inter-state commerce. In fact, I do not know of any limitation upon the power of Congress to regulate carriers, except where the act violates some other limitation of power. Its power is plenary, supreme. Without dwelling at length upon a question that has been suggested to my mind, I will submit it for your consideration. We know that under the law, as it exists to-day, a man who signs a bill of lading fraudulently is not executing a paper that is of any validity whatever, it having been done without authority.

Can you by statute under the commerce clause of the Constitution create a responsible agent for a quasi-public corporation and clothe him with the power to execute a certain paper which, by virtue of the act, shall bind the assets of said corporation? Having created the agent, there is another step to be taken; you must create a shipper, or no contract can exist to carry and deliver. You now have all the parties necessary to a bill but the consignee. Why should not the statute create a consignee? Your power is to regulate commerce, which you seek to do by a paper which declares that there is commerce, but which we know is not true. If there was commerce probably your powers to regulate it would be sustained, but will the courts sanction the claim that you can take jurisdiction of a subject

under the principle of estoppel when the fact of commerce does not exist?

Under the decisions of the Supreme Court there must be a delivery to a carrier of the goods for shipment before the regulating power of Congress can apply. In the case of the Philadelphia Cab Co. (192, U. S.), the court reviews all the authorities bearing on this question as to what is commerce, and when commerce is subject to the jurisdiction of Congress. The court illustrates by saying, starting a cart or wagon loaded to the depot does not constitute interstate commerce, although those goods are to be taken to the depot and loaded into a car for an interstate journey; that it is not commerce until the goods reach the carrier and are delivered to it. It holds the same with reference to floating logs down the river till they reach the point where they are to be shipped as interstate commerce. It is not interstate commerce until they reach the point of shipment. Non constat, they may sell those logs anywhere within the jurisdiction of the State and never ship them as interstate commerce.

The court further illustrates its position by holding that if you claim that carrying a man in a cab from the hotel to the station is interstate commerce, then is it not interstate commerce when the porter brings his trunk down to put on the cab, and is the porter engaged in interstate commerce? No; the court says, this is not interstate commerce.

In view of the decision of the Supreme Court as to when commerce commences over which Congress can exercise the regulating power, I suggest, can you provide regulations under that clause of the Constitution when there is no commerce on which the regulations can operate—when there is no commerce to be affected by the rule and regulation that you are making? When there is no agency in fact, but only in law? When there is no shipper or no consignee but fictitious persons? When, in fact, there is no commerce?

There is one other question, Mr. Chairman, I want to refer to. I have discussed the questions involved in the consideration of this bill. I have shown you the attitude of the carriers and their desire to meet all the reasonable and just demands of the public under the new uniform bill of lading. We find that everything (so far as the carrier is affected), in the opinion of Prof. Williston, has been satisfactorily adjusted, except the one as to the carriers' liability for the goods described in the bill of lading when the goods so described have not been received.

An examination of the differences between the old and new bill of lading will satisfy any impartial mind that the carriers in agreeing to the form and conditions of that bill surrendered many legal rights and defenses to the shippers and to the merchants of the country. If Congress shall, in addition to these concessions, impose upon the carriers a liability as guarantor of all its bills of lading, is it an unreasonable request that they should have some compensation for additional service and risk? I do not only ask this at the hands of the committee, but I ask those who are interested in this bill—shippers, bankers, or others—whether that is not a fair suggestion?

The tariff now provides that if the shipper requires the carrier to transport his goods under the rule of common law, the risk being

greater, a reasonable advance in rates is legal. This is a part of the tariff filed with the commission. Mr. Thom told you the practice in reference to stock transportation and other carriage. This has been uniformly the rule. This increased rate would not meet the liability that may result from this legislation, but it may be a partial compensation for the responsibilities and obligations which you impose upon them—thus distributing the loss between the several interests affected by the bill. I think, Mr. Chairman, that even our shippers, when they come to consider this suggestion, will feel that it is but equitable, fair, and just. Even they must admit that it is not an unreasonable request and, if it is not, it ought to be embodied in this act.

I thank you for your courtesy and attention.

The ACTING CHAIRMAN. Supposing a warehouseman's agent issues a warehouse receipt for goods and the goods are not delivered; is the warehouseman liable now?

Mr. FAULKNER. He is under statutes only. But you see, Mr. Chairman, the difference. There you have a warehouse with a superintendent, a man in authority, just like the condition existing in a bank. The cashier of a bank will be held responsible for his acts within the limit of his authority, which is to certify checks, etc., and to certify other papers. But suppose that bank officer steps without the door of the bank and certifies a check that is of no value?

The ACTING CHAIRMAN. What I mean is if an agent of a warehouseman willfully issues a receipt for goods which in point of fact have not been received, except by statute, is the warehouseman liable?

Mr. FAULKNER. I think not.

The ACTING CHAIRMAN. The receipt can be explained?

Mr. FAULKNER. Yes, sir; the receipt can be explained, except under a certain statute.

The ACTING CHAIRMAN. Are you able to give me a reference to the uniform bill of lading statute?

Mr. FAULKNER. No; we have no statute; it was an agreement.

The ACTING CHAIRMAN. It was an agreement?

Mr. FAULKNER. An agreement between all interests represented with the Interstate Commerce Commission.

Mr. JAMES. If you will pardon me, you will find that reported in volume 14 of the Interstate Commerce Commission reports. The commission held that they had no power to prescribe—

Mr. FAULKNER. Not that exactly. They had no power to prescribe certain things.

Mr. JAMES. Pardon me, but I am giving my recollection. If I am wrong, the report will correct me. The Fourteenth Interstate Commerce Commission Report contained an opinion by the commission written by Mr. Knapp which contains this very form which is referred to.

The ACTING CHAIRMAN. Senator, let me call your attention to the first line of Senate bill 957 introduced by Senator Clapp. I will read it to you. I do not think you will need to have it.

Mr. FAULKNER. I have it here now.

The ACTING CHAIRMAN. "That whenever any common carrier, railroad or transportation company."

Now, the other bill, S. 4713, introduced by Senator Pomerene, simply provides:

That bills of lading issued by any common carrier for the transportation of goods.

In your opinion, do the words in the Clapp bill, "railroad or transportation company," include anything other than a common carrier?

Mr. FAULKNER. No, sir; I think not.

The ACTING CHAIRMAN. Are there no transportation companies that are not common carriers?

Mr. FAULKNER. Well, if they transport goods for hire between points in one State to points in another State they would be included as common carriers under the definition of common carriers.

The ACTING CHAIRMAN. Would anything be detracted from the Clapp bill by striking out the words "railroad or transportation company"?

Mr. FAULKNER. I think not.

The ACTING CHAIRMAN. That is all. Senator Clarke, you may inquire.

Senator CLARKE. In view of the fact that a casual remark of mine made on yesterday has brought before the committee the very learned and full collection of the authorities that support a view contrary to the one I indicated, I believe I will consume about three minutes of the time of the committee stating my position about the matter, and not engage in interrogating Senator Faulkner, to express my view, if I may address the committee.

The ACTING CHAIRMAN. The committee will be very glad to hear you, Senator.

Senator CLARKE. I object to the doctrine in the Friedlander case (130 U. S.), because it pays too much attention to the rule of stare decisis and too little to the common sense of the age, as it has to be applied to the development in commerce and transportation at the date of its announcement.

The first defect I discovered was the fact that it gave to the relation of agency a significance that it did not possess in that particular case. The agent was not the agent of anybody. He was the vice principal of the company. He was put there, and the only person put there or put anywhere to perform for them, an intangible entity as a corporation, the substantive acts for which the corporation was created, to wit, the receipt of freight for transportation. All those other matters are merely incidental. That is the primary object of creating a transportation corporation; that is, the primary object of creating a transportation corporation is to transport freight and passengers.

He represented the company, and nobody else did. The president of the company never does such work as that, and the shipper can not look around and find him. He delivers his commodity to the railroad to be transported, and he deals with the only person he finds there, and he finds him in his capacity as principal, and not as agent. The rule of agency was attenuated in that case until they did not leave enough of it to do justice.

My next criticism of the action of the courts consisted in the fact that they applied rules that were well enough applied in the case where they were originally developed, but they related to conditions that had no possible similarity to the conditions with which they dealt.

The first steamboat case came up in 1814, when the steamboat business was in its infancy. They took no notice of the fact of the development of the railway and the immense systems in it, which had to consolidate itself by the progress of events and the laxity of the laws. So that a steamboat case did not justify any such rules, for the reason that in the days when these cases were decided, and in the days when any steamboat case would probably be decided, the same evils were not to be guarded against. There were no express trains then to carry the bills of lading and the draft attached to it, which would fall into the hands of the banker. He must pay it within three days—the grace allowed by law—or they would be protested. The goods would then get to the point of destination as quickly as the bill of lading. No such conditions obtain now. A shipment going from Texas to Liverpool probably requires 30 days.

Neither do I think the English cases apply, because in that country the average haul is 24 miles, and the bill of lading and the goods can get to the point of destination as quickly as the bill of lading can get there, and an inquiry within the three days will discover whether they are there or not, and the banker will not likely be called upon to make the payment before he has had an opportunity to protect himself by inquiry.

The defect in the rule is that the railroad could protect itself by diligence, because they are not compelled to issue bills of lading until they are satisfied that they are issuing them properly and honestly. No haste about it. No complication. Only a little diligence upon their part will remove that in every instance. Whereas the consignee can not protect himself, because he can not make the inquiry under the customs of business. In order to keep up with his competitors he has to pay the bills that are drawn upon him.

In this country the average haul is 250 miles, so that in every instance the bill of lading and the draft attached to it will get to the point of destination before the goods would get there, or before he has any right to inquire of the carrier whether they will come or not.

Mr. James J. Hill says that the average freight in this country moves at the rate of 24 miles a day. So that even the average haul and in cotton it is 1,000 miles or 1,500 miles, and that is a commodity that suffers most from this condition—10 days must elapse after it is put on the car and the car started before it can reach the destination of 260 miles.

I think, therefore, that the court in attempting to apply, as it always does, ready-made reasoning that has been developed in connection with situations that do fit perfectly and do justice, no doubt, did not give expression of their judicial expression of the rule that was necessary to do justice in this particular case. If that decision had been otherwise, the ingenuity of the railroad company would have protected themselves within a few hours, because they would have been a little more careful about the forms of the bill of lading, they would have been a little more careful about the character of the paper, and they would have been a little more careful about allowing people to obtain blank bills of lading. And every similar organization would have protected them.

Then the fundamental objection is that in modern commerce the bill of lading is just as essential as the negotiable instrument. They go together. Many a man draws a bill who has no personal acquaint-

ance with the man on whom it is drawn. There needs to be an assurance given formally by the carrier that a certain commodity has been received and transported. Then the person on whom the draft is drawn will feel safe, knowing that if the railroad has certified, the quantity is true, and he trusts the commodity rather than the person who draws the draft.

The fact is the business of selling cotton could not be conducted on any other basis. Very few businesses engaged in the buying of cotton locally have enough money to buy it for cash and sell it out for cash. So that it is not a hardship upon the railroads to make them do honestly what they have to do at all. They say that they are in the transportation business, and they are not in the business of issuing bills of lading except for that purpose. That is true. But they ought to be in the business of issuing bills of lading when they issue honest bills of lading, and they are allowed to take ample time and employ ample agencies to see to it that when a bill of lading leaves the office, signed by those authorized to sign genuine bills, that it is what it purports to be. It is simply the question of adjusting a liability so as to put it upon a person who has an opportunity to protect himself, in preference to one who has no opportunity at all. I have no disposition whatever to create a liability against the railroad companies that is not just, and if this was a considerable one, there might be room for more cause than this objection calls for. You heard Mr. Bond say that he had been connected with the Baltimore & Ohio Railroad for 30 or 35 years, and in his entire experience with that road he never knew an agent issuing a bill of lading without the commodity being delivered. I believe Mr. Thom made the same statement about the Southern Railway Co., although he did not indicate the length of time which he had been in service in that company.

So you will see that, notwithstanding these gentlemen say it is difficult to get intelligent and honest depot agents, they are hardly generous to that splendid body of employees that they have assembled because their statement of facts does not correspond with the opinion that they express. I think it is a remarkable tribute to that body of employees that in that system, represented by these two big companies, extending probably 20,000 miles, that in 30 years no such thing has happened as they now say will wreck the entire railway business, and think they ought to be allowed to charge an insurance rate simply because they are expected to do it.

The evil of the business is that they penalize commerce because it throws suspicion on every bill of lading—because now and then once in 10 or 15 years some bill of lading turns up to be issued without the commodity having been delivered to the carrier.

If the case against Friedlander had been decided against the railroads it would have involved the loss of \$10,000—200 bales of cotton. In a week's time the business would have absorbed that liability and provided against it, and provided against its repetition, or if it did not provide against its repetition, would make it the same with an instrument solemnly put out by a corporation.

Now, I think the easy flow of commerce is promoted by its certainty and its honesty, and when any institution gives a paper over the signature of a person authorized to receipt for it that a certain state of fact exists, and they know at the time that certificate is issued that a person is going to act on it, and if it should turn out that the party

who does act upon it will sustain a loss, then they ought to make careful inquiry in advance and know what they are doing, and if they do not do it they ought to bear the responsibility. That is my view of it.

I had a memorandum of a few little things that I desire to say, but I think I have sufficiently stated the view I hold about that particular matter. I believe it was a misfortune for the railroads, because it has raised an agitation that has caused a division among shippers and transportation companies that is not justified by the actual losses that would result from the reverse of the rule.

The CHAIRMAN. Unless there is some objection, I will ask the reporter to insert in the record this uniform bill of lading which has been referred to.

There being no objection, the paper is incorporated in the record, and is in the words and figures following:

IN THE MATTER OF BILLS OF LADING.

[Vol. 14, I. C. C. R., pp. 346-355. June 27, 1908.]

The subject of bills of lading considered and a uniform bill of lading recommended.

KNAPP, *Chairman*:

This is a proceeding of investigation and inquiry instituted by the commission on November 21, 1904. Shortly before that date numerous petitions were received from the Illinois Manufacturers' Association and other commercial organizations in official classification territory complaining of the proposed adoption by railroad companies operating in that territory of certain changes in the so-called uniform bill of lading then generally used in the transportation of freight over their respective lines.

To inform itself concerning the controversy brought to its attention by these petitions, the commission ordered an investigation, and the first hearing was had on the 5th and 6th days of December, 1904. It appeared at that time that the matters in question were the proper subject for negotiation and settlement between the various conflicting interests, and upon the suggestion of the commission a joint committee of shippers and carriers was appointed to formulate a suitable bill of lading and report the same to the commission. During the year 1906 and the first months of 1907 this committee held numerous conferences and gave the subject most careful attention. On June 14, 1907, they made a report to the commission and submitted a bill of lading which appears to have been agreed upon and consented to by the original petitioners and by substantially all carriers in official classification territory. The commission was thereupon asked to approve this bill and direct its adoption.

In order that the matter might be more fully considered and other shippers and carriers have opportunity to be heard before taking action, the commission on July 8, 1907, made a supplemental order, reciting the proceedings up to that time, providing for a further hearing on the 15th of October following, and requiring carriers to whom it was sent to show cause on that day why the proposed bill of lading should not be approved and prescribed by the commission to be used on and after January 1, 1908. A copy of this order, with copies of the proposed bill of lading and of the petition of the Illinois Manufacturers' Association (the other petitions being similar thereto), was thereupon mailed to all railroad companies subject to the act to regulate commerce, so far as they were known, and they were directed, if they desired to object to the adoption of this bill of lading, to file their objections in writing with the commission on or before the 16th day of September, 1907.

On the 15th of October, the date named for the second hearing, there was a large attendance and the matter was discussed at length by representatives of various interests. While the fundamental features of the bill were not the subject of much dispute, there was considerable conflict of views and demands respecting certain provisions of more or less importance. Some concessions were virtually made during the progress of the hearing and other points of disagreement were reserved for further consideration.

Since this public hearing, and from time to time down to almost the present, there have been informal conferences with representatives of various interests, and an extensive correspondence has been conducted, all with the view of reducing differ-

ences to a minimum and securing the widest possible assent to a bill of lading which the commission might approve. It seems quite unnecessary to mention the different questions which have been raised or to review the arguments by which divergent opinions have been supported. While the efforts of the committee have resulted in close approach to agreement, at least so far as concerns miscellaneous freight and general merchandise, there are a few points upon which complete accord has not been secured. Of these, the principal one relates to the construction of the so-called Carmack amendment, included in the enactment of 1906, and that question will doubtless remain unsettled until finally determined by the courts. There are also some special interests which are not altogether satisfied with the bill in its present form. Nevertheless, the degree of unanimity attained in regard to this matter is proof of the earnest endeavor of the committee to reach a common understanding, and amply justifies their appointment. The commission has been measurably relieved from a task of great difficulty, because the bill as now submitted represents in most, if not all, of its principal features a virtual agreement between shippers and carriers.

In its general scope as well as its detailed provisions this bill does not differ materially from the one assented to and proposed to the commission in June, 1907, as above stated. Such changes as have been made, and they are quite numerous, have all been in the direction of greater simplicity and are all believed to be in the interest of the shipping public. Aside from these modifications of the bill as submitted a year ago, another change has been made which is regarded of great practical value. This change consists in the provision of two forms or kinds of bills of lading in place of the single form now and heretofore in use; one to be used for "order consignments" and the other for "straight consignments," as those terms are understood in commercial dealings. These two forms will be distinguished by different colors and each will contain provisions suited to its separate purpose. They will differ only on the face side, the conditions printed on the back being the same in both cases. These differences will appear upon inspection, and need not here be enumerated. The main point in this connection is that the "order" bill will possess a certain degree of negotiability, while the "straight" bill will be nonnegotiable and is to be so stamped upon its face. Moreover, and this is a matter of consequence, the order bill of lading will be required to be surrendered upon or before the delivery of the property to the consignee. It is believed that this plan will in large part meet the requirements of the banking concerns of the country which advance vast sums of money upon bills of lading and are entitled to a reasonable measure of protection.

This proposed bill of lading—for the two forms may be considered as one in what we have further to say—is submitted for adoption by the carriers and use by the shipping public with considerable confidence. It is not claimed to be perfect, and experience may develop the need of further modifications, but it represents the most intelligent and exhaustive efforts of those who undertook its preparation to agree upon a bill of lading which should be reasonably satisfactory to the railroads and the public. It is, of course, more or less a compromise between opposing interests, because on one hand it imposes obligations of an important character which carriers have not heretofore assumed, and on the other retains exemptions to which some shippers may object and perhaps not without substantial reason. As we are advised, it is in some respects less favorable to the shipper than the local laws or regulations of one or more States, but is more favorable to the shipper than the local laws or regulations of most of the States. On the whole, it is believed to be the best adjustment which is now practicable of a controversy of long standing which affects the business interests of the entire country.

Whatever criticisms or objections may be advanced, this bill of lading is concededly a great improvement upon the bills now in general use. Its adoption, we are persuaded, will be a long step toward uniformity, simplicity, and certainty. It will likewise be a long step in the direction of fair dealing between shipper and carrier, and may be confidently expected to remove much of the confusion which now exists and to measurably avoid in the future the irregularities and injustice which have heretofore occurred. The results of practical operation may disclose defects not at present perceived, and further adjudications by the courts may require a change in some of its provisions, but we believe it should be given an honest trial, and are strongly of the opinion that it will be found fairly suited to the practical needs of the business community. If it proves otherwise under the test of experience the commission will exercise its corrective authority as to any matter within its jurisdiction.

As above suggested, this bill of lading is designed for use in connection with the movement of miscellaneous freight and general merchandise and as a substitute for the bills now in use in the carriage of this description of property. It is not intended to take the place of special bills of lading which are issued on particular commodities of such a nature or so handled as to require exceptional provisions, such as live stock, for example, and perhaps perishable property. In short, this bill is proposed as a uniform or standard bill, so to speak, to be used in connection with freight articles

generally, except such as now are or ought to be carried under special conditions. We are unable from want of knowledge to indicate just what commodities fall within this exception, much less to determine the special provisions suited to any accepted commodity, and therefore do not attempt to go further at this time than to approve of what may be called a standard bill of lading.

Nor do we undertake to prescribe this bill of lading and order its adoption, because we are convinced that such an order would exceed our authority. Moreover, the situation makes no demand for a positive direction. The circumstances under which the work of the joint committee has been conducted and the substantial agreement on most points by the different interests concerned, to say nothing of direct assurances from representatives of the carriers, warrant us in expecting that the assenting roads will adopt the bill upon our recommendation. We therefore assume that the railroads in official classification territory, whose proposed action was the subject of the original investigation, will adopt and use this bill to the extent above indicated from and after the date named for that purpose.

We shall also expect that railroad carriers subject to the act outside of official classification territory will adopt and use this bill of lading to the same extent and from and after the same date. There may be peculiar conditions in western and southern territory which require some modifications of or additions to this standard bill, but the desirability of uniform usage is so great and the reasons for it so obvious as to justify the expectation that carriers in western and southern territory will adopt the bill in question to the fullest extent practicable without abridging any just privileges which their shippers now enjoy.

Accordingly the commission hereby gives approval to the bill of lading annexed to this report and made a part thereof, the "order" bill and "straight" bill differing only on the front page, the conditions printed on the back being the same in both cases, and recommends its adoption and use to the extent above named by all carriers subject to the act to regulate commerce from and after the 1st day of September, 1908. The intervening period is allowed for printing new bills and using those now on hand. As indicated by the "Notes," there are minor details which will be arranged by the uniform bill of lading committee and should also be adopted.

It should be distinctly understood that this approval does not imply acceptance by the commission of any construction of the Carmack amendment at variance with its apparent purpose and intent, nor will the general recommendation now made preclude the commission from passing independent judgment upon any provision in this bill of lading which may be drawn in question in future proceedings.

An appropriate order will be entered.

—— RAILROAD CO.

ORDER BILL OF LADING—ORIGINAL.

Received, subject to classifications and tariffs in effect on the date of issue of this original bill of lading, at ———, 190—, from ——— the property described below, in apparent good order, except as noted (contents and conditions of contents of packages unknown), marked, consigned, and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

NOTES.—The foregoing will appear on the front or first page of the bill of lading.

In connection with the name of the party to whom the shipment is consigned the words "Order of" shall prominently appear in print, thus: "Consigned to order of ———."

The bill of lading is to be signed by the shipper and agent of the carrier issuing same, and space shall be provided for this purpose.

The detail arrangement respecting other matters that customarily appear on the face of the bill of lading, such as name of destination, car numbers, routing, description of articles, weights, etc., will be prescribed by the uniform bill of lading committee.

The size of the bill of lading shall be 8½ inches wide by 11 inches long.

Order bills of lading shall be printed on yellow paper for convenient distinction from bills of lading covering other than "order" consignments.

——— RAILROAD CO.

BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

Received subject to classifications and tariffs in effect on the date of issue of this original bill of lading at ———, 190—, from ——— the property described below, in apparent good order, except as noted (contents and conditions of contents of packages unknown), marked, consigned, and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

NOTES.—The foregoing will appear on the front or first page of the bill of lading.

The bill of lading is to be signed by the shipper and agent of the carrier issuing same, and space shall be provided for this purpose.

The detail arrangement respecting other matters that customarily appear on the face of the bill of lading, such as name of destination, car numbers, routing, description of articles, weights, etc., will be prescribed by the uniform bill of lading committee.

The size of the bill of lading shall be 8½ inches wide by 11 inches long.

Bills of lading covering what may be termed "straight consignments," being those other than "order consignments," shall be printed on white paper.

Bills of lading other than those covering "order consignments" shall be stamped "not negotiable."

The following conditions will appear on the back of the bill of lading:

CONDITIONS.

SECTION 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

SEC. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

SEC. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination, but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to

the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

SEC. 4. All property shall be subject to necessary cooerage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

SEC. 5. Property not removed by the party entitled to receive it within 48 hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held 48 hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

SEC. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

SEC. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

SEC. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

SEC. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters, or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and to be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

SEC. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Senator POMERENE. Mr. Faulkner, fixing freight rates, the Interstate Commerce Commission, of course, takes into consideration all classes of expenditures and risks which are involved in that business?

Mr. FAULKNER. Beyond question.

Senator POMERENE. Now, then, if the enactment of this bill into a law should increase appreciably the losses of the company, would not the Interstate Commerce Commission have the right to take that fact into consideration in determining whether the rates were reasonable or otherwise?

Mr. FAULKNER. Well, I hardly think you would want to make this so that the increase of rate would apply to the entire property carried by the carrier, whether it was under an order-guarantee bill of lading or not.

Senator POMERENE. But if the losses to the company by reason of this contemplated law were appreciable, would not the Interstate Commerce Commission be justified in taking that fact into consideration in determining the reasonableness or unreasonableness of the freight rates?

Mr. FAULKNER. I think they hardly would. For example, you carry all of this freight of similar character on both order and straight bills of lading. They would not allow a raise of rate on that particular carriage that the carrier would not assume an additional responsibility. You do not have a particular rate on this product or that product because of this extra rate. They are put in class rates, most of them.

Senator POMERENE. I am assuming now that by the enactment of this bill you are increasing the legal responsibility of the carrier. Now that being so, would not the Interstate Commerce Commission be justified in taking into consideration that fact in determining the reasonableness or unreasonableness of the rates charged.

Mr. FAULKNER. How would you do it? Here is a rate on certain given articles. If the thing is not asked to be carried on a guaranty order bill of lading, why, it is regular rate; but if that particular shipper wants it carried on order guaranty bill of lading, then put a percentage above that rate.

Senator POMERENE. You are assuming now——

Senator CLARKE. Let me ask you, Senator Pomerene, if I understand your question. Your idea is that it is the cost of operation; that if it turned out at the end of the year that they had sustained certain losses, it would be treated as a loss of operation and go in, as a matter of course?

Senator POMERENE. That is the thought exactly.

Mr. FAULKNER. Would they allow it to be determined on a general question of rates, which I doubt very much? As you say, on the question of cost of operation they might do it.

Senator POMERENE. I think I understand your view on that subject. Now, another matter. It has developed here in these hearings that there are perhaps two classes of losses, one of which is due to the positive dishonesty of the freight agent in issuing bills of lading for

goods which he has not received and which he has no intention of receiving by the railroad; the second is that he issues these bills of lading by connivance of his superior officer for the accommodation of the shipper, and for which, of course, if there is a loss, the agent would not be morally responsible. Have you any data which would give us an intelligent statement of the proportion between those two classes of losses?

Mr. FAULKNER. I have not; and I do not suppose that any of the carriers have. I think that as to the second proposition you made it is covered by the interstate commerce law completely.

Senator POMERENE. What provision do you refer to?

Mr. FAULKNER. I mean as to discrimination. I think all of the penalties as to discrimination could be enforced against the shipper and the carrier under that provision of the law by the use of accommodation bill of lading.

Senator POMERENE. Let us understand each other fully. When I referred to this second class, one of the shippers said here that the most of losses were at competitive points, where the agent, through the encouragement of his superior, would go out and solicit goods for carriage, and would extend this accommodation to those shippers for the purpose of encouraging them in delivering their goods to this company. Now, can you tell us what amount of losses have occurred with your company, of this character?

Mr. FAULKNER. No, sir; I want to say in qualifying your statement a little to meet that, I know of no one who has testified to that fact, or stated it of his own knowledge. It has been upon inference, that it was done by an agent with the concurrence of a higher officer.

Senator POMERENE. With the knowledge of the higher officers, we will say.

Mr. FAULKNER. I mean with the knowledge of the higher officers; but all of the witnesses who have appeared here say that it was done by the agent with the hope of showing a larger business at his place in order to help his promotion. But they could never state that it was done with the knowledge of the higher officers, with their consent. But I think the present law covers that completely as to discrimination.

Senator TOWNSEND. I think the witness who appeared just before you did state it as Senator Pomerene states it.

Mr. FAULKNER. He may have stated it, but he never stated it of his own knowledge that it was so, because it can not be so.

Senator POMERENE. It does occur to you, from your experience in railroading, that a large portion of the losses—assuming that there are large losses—would occur in this way rather than from a positively dishonest motive on the part of the freight agent?

Mr. FAULKNER. I think most of the cases that have occurred, have occurred just in this way; the party has come and shipped his goods and gotten his bill of lading. He comes and says to the agent, "I am going to ship another to-morrow," and the agent, relying upon his integrity—and in all businesses you have to rely upon that—gives him a bill of lading. He may ship it or may not. Then he may ship another, and get another bill of lading from another agent or another road, and in that way defraud the consignee or holder of the bill. But I think that is being pretty well watched now, and pretty closely

watched, and I think most of the practices that have been objectionable—as I think the shippers will all agree—are improving rapidly.

Senator POMERENE. Now, to get your view of the law, assuming that the *modus operandi* that you have described, becomes known to the railroad officials and is proved or at least is not disproved by them—

Mr. FAULKNER. Sanctioned.

Senator POMERENE. Sanctioned, in other words; do you think that under this Friedlander case the railroad company would be relieved from liability?

Mr. FAULKNER. No; not at all. The Friedlander case does not change the doctrine of agency at all. It simply stands on the doctrine of agency, and if the party holding out, and with knowledge of the principal allows him to do so and so, it binds the other whether he had authority or not. The authority would be presumed.

Senator POMERENE. I approve what you have said upon that subject. It seems to me that the railroad people have unconsciously, perhaps, extended the scope of this Friedlander case beyond what the opinion itself justifies, and I want to put into the record here just a paragraph of that, but before doing so I want to say that the opinion of the court in this case was based upon an agreed statement of fact. I read now from the opinion on page 423:

The agreed statement of facts set forth "that, in point of fact, said bill of lading of November 6, 1883, was executed by said E. D. Easton, fraudulently and by collusion with said Lahnstein and without receiving any cotton for transportation, such as is represented in said bill of lading, and without the expectation on the part of the said Easton of receiving any such cotton;" and it is further said that Easton and Lahnstein had fraudulently combined in another case, whereby Easton signed and delivered to Lahnstein a similar bill of lading for cotton "which had not been received, and which the said Easton had no expectation of receiving;" and also "that, except that the cotton was not received nor expected to be received by said agent when said bill of lading was by him executed as aforesaid, the transaction was, from first to last, customary."

So that I take it that assuming that the method of business had prevailed of the agent issuing these bills of lading before the goods were in fact received and that mode of business had become known to the railroad company and was approved by the railroad company, or sanctioned by it, that they could not be heard to say that the act of the agent was beyond the scope of his authority?

Mr. FAULKNER. No; because he gave them the authority to do it.

Senator POMERENE. Now, that being so, the only liability which the railroad company would have would be in that class of cases where the freight agent issued a bill of lading when there were no goods in sight and none were intended to be received. In other words, where he had perpetrated a fraud upon the railroad company?

Mr. FAULKNER. Well, I think it would go a little further than that.

Senator POMERENE. To what extent?

Mr. FAULKNER. If it was not customary and known to the company and its officers that it was the usual custom to issue bills of lading without the receipt of the goods, whether there was a fraudulent intent or not, the company would not be liable. But if they did know of this usual custom and sanctioned that usual custom of the agent, then they would be responsible whether the act was fraudulent on the part of the agent or not fraudulent, but done by mistake.

Senator POMERENE. Now, assuming that to be so, would not that reduce the losses to the railroad company to a minimum, a negligible quantity, in the event this bill becomes a law as it is now written?

Mr. FAULKNER. I would say not. I do not see how any of these acts of agents, whether done by mistake or by fraud, would be, as I do not believe it is a matter of custom approved and sanctioned by the railroads as it exists to-day.

Senator POMERENE. Well, let us take another view of this. Suppose that you were, or your railroad companies were, permitted to charge a certain extra amount for a guaranteed bill of lading. Would not the real effect of that be to make the railroad companies more careless in the employment of their freight agents?

Mr. FAULKNER. No; I do not think it would. I do not think that they are careless at all in that. I think they employ good men; as you will notice, in my opening I stated so, but there are certain conditions in small communities where it is very difficult to get an intelligent, active man, who can perform well all the functions that are devolving upon him at that station.

Senator POMERENE. In your vast system of railroads, can you point out any such instance?

Mr. FAULKNER. Well, I am not brought directly in contact with any of the agencies along the line of the road, and, of course, I am not competent to do it, but I have not any doubt as a matter of common human experience that that is so. I would expect it. That is only an exception, I think, to the rule.

Senator POMERENE. When the railroad company or its agent issues these bills of lading for shipment they expect and the country at large expect that full faith and credence shall be given to them?

Mr. FAULKNER. No; there is no assumption on the part of the carrier at all that such bills have any of the characteristics of such paper for the purpose of securing the advance of money on them. They know it is a fact, but it is not within the functions of the railroads to issue such negotiable paper unless they have the right by their charters.

Senator POMERENE. With all due deference, it seems to me that you are rather evading my question.

Mr. FAULKNER. No; I will answer it frankly in this way: Is not the carrier absolutely controlled in the exercise of its functions and powers by the terms of its charter of incorporation? Do you know of any single charter of incorporation within the last 40 years—prior to that there were some—which gave to a railroad company the power to issue any paper that was in any sense negotiable?

Senator POMERENE. Well, we are not speaking about this as negotiable paper now, and I am not looking at it from the standpoint of the law merchant at all; but when I deliver to you as a common carrier a certain consignment of goods, and you issue to me a certain paper receipting for those goods, and guaranteeing the safe carriage of them—not guaranteeing them, but contracting to safely carry them—you expect me, and anyone who may receive that from me, baring accidents, to give full faith to that piece of paper, do you not?

Mr. FAULKNER. For what it is worth.

Senator POMERENE. For what it is worth. In other words, you have simply given to me a piece of paper which your duty as a common carrier requires you to give to me. That being so, when you defend against that bill of lading, raising the question that the goods were not in fact received by the agent who issued it, are you rather not seeking to shirk a responsibility which belongs to the railroad

company and seeking to shove that responsibility upon the shoulders of the shipper? In other words, to make myself clear, by this law Congress seeks to make the railroad company bear its responsibility and prevent it from shirking its responsibility, and does not in fact add to the responsibility of the railroad company.

Mr. FAULKNER. Is that what you want me to answer?

Senator POMERENE. Yes; I would like to have you answer.

Mr. FAULKNER. My answer is simply that there is no release of liability where a supposed agent has signed a bill of lading without authority, as no obligation under the doctrine applicable has attached, and to all other transactions under the doctrine of agency they could not be held responsible for his act any more than if it had been a third person who signed it without any knowledge whatever on the part of the company that the party was within a hundred miles of any station of that carrier.

Senator POMERENE. In other words, you want the railroad company to be permitted to invoke the old rule, "it is not so nominated in the bond"?

Mr. FAULKNER. On the same principle that you would invoke it if a man would sign your name to a note without your authority—exactly the same principle and no other. What is good for the one ought to be good for the other.

Senator POMERENE. Well, if I had authorized somebody to sign notes in connection with my business, do you not think that I would be going to the extreme limit, if he would step outside of my office and sign my name to a note, if I would attempt to evade that liability?

Mr. FAULKNER. If you had given him authority to sign your name to your letters and he had executed that fairly and justly, and inside or outside of your room had signed your name to a note without authority, I would say it would be very unjust to you to even suggest the payment of it.

Senator POMERENE. One is a case of criminality and the other is perhaps the case of a little bit of negligence on the part of the railroad company?

Mr. FAULKNER. Yes; there are cases of negligence.

Senator NEWLANDS. Senator Faulkner, I wish to ask you if in your opinion there are very many instances of either mistaken or fraudulent issues of bills of lading, during the past five years, involving any large amounts?

Mr. FAULKNER. I can only answer that from having heard all the evidence before the committees of Congress by all the shippers and others, that there have been a number of mistakes and errors and losses—not any very large ones, except in one or two instances, when they reached as high as \$10,000, I think, in one case. But taken in comparison with the number of bills of lading, the losses, it struck me, speaking absolutely impartially, have been wonderfully small.

Senator NEWLANDS. Assuming, then, that you had been obligated to pay the amounts claimed in these various cases and they had been added to the operating expenses of the company as an item in determination, would it have been considerable?

Mr. FAULKNER. That, of course, it is impossible to tell. I can only speak of those that have actually mentioned their losses before committees, which shows that it is very small as compared really to the actual losses that must necessarily occur in such an immense volume of commerce.

Senator NEWLANDS. If we pass this bill that is now pending before us, would you expect those cases to multiply or diminish?

Mr. FAULKNER. Unless you put a penalty on the parties who are guilty of those acts, I think perhaps it would encourage rather than not do so.

Senator NEWLANDS. Your expectation is, then, that it would encourage fraud?

Mr. FAULKNER. For the reason that now the bill of lading is not negotiable; whereas if you pass this bill there would be a stronger inducement to perpetrate a fraud than exists to-day.

Senator NEWLANDS. And for that reason you assume that the liabilities of the corporation would be increased and that it would really constitute, or might constitute, a serious factor?

Mr. FAULKNER. I do, indeed. I can not tell, though. It is only a mere guess or opinion.

There being no further questions, Mr. Faulkner was thereupon excused.

The ACTING CHAIRMAN. Before taking an adjournment I will state that a telegram has come, addressed to the chairman of the committee, from Mr. Phelan Beale, relating to the controversy between himself and the representatives of the Southern and Louisville & Nashville Railways, and I will ask the reporter to insert it in the record, and the representatives of the railroads may look at the telegram before it goes in.

The telegram referred to is as follows:

NEW YORK, N. Y., March 1-2, 1912.

Senator CLAPP,

Chairman Interstate Commerce Committee, United States Senate.

My representative, Mr. Richter, who is present on the railroad bill of lading measure, has wired me that the railway attorneys have questioned my statement made to your committee two weeks ago. I see no room for dispute as to the correctness of my statement unless it be concerning the charge that agents of the Southern and Louisville & Nashville Railways in Selma and Decatur, Ala., deliberately falsified in answer to a telegram of inquiry concerning their receipt of cotton for shipment to New York, to the effect that the said cotton was on the way, when in fact it had not been received by them and that such agents were still employed by the said railroads. If this be the point, as well as my claim that Mr. Bywater, foreign freight agent of the Louisville & Nashville Railroad, wrote letters showing his full knowledge of the practice of issuing accommodation bills of lading and his approval therefor, and the point is considered material by your committee, I beg that you name a date sufficiently far in advance so that during the interim I may get the testimony given by the said railway freight agents and others under oath in the United States courts in Alabama in two cases certified and appear with such certification, together with original telegrams from said agents and other data to support my statements. I am willing to rest my case on my charges and my ability to prove the same substantially. I respectfully ask that you read this message to your associates and to the attorneys for the railways present, and that this message be incorporated in the record as a part of the statement which my representative, Mr. Richter, makes for me. Important court engagements here alone prevented me from attending before you to answer the attacks that I anticipated would be made upon my statement by the railroad representatives. I respectfully apologize to the committee for this informal manner of addressing it and only resort to this remedy by force of circumstances.

Respectfully submitted.

PHELAN BEALE,
Attorney for the German Cotton Exchange of Bremen.

The committee thereupon, at 1 o'clock and 15 minutes p. m., adjourned until March 15, 1912, at 10.30 o'clock a. m.

FRIDAY, MARCH 15, 1912.

COMMITTEE ON INTERSTATE COMMERCE,
UNITED STATES SENATE,
Washington, D. C.

The committee met at 11.15 a. m.

Present: Senators Clapp (chairman), Crane, Cummins, Oliver, Lip-
pitt, Townsend, Newlands, Clarke, and Watson.

The CHAIRMAN. The following letter from Mr. C. F. Oppermann,
with newspaper clipping, will be inserted in the record:

GALVESTON, TEX., March 4, 1912.

SENATE SUBCOMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

GENTLEMEN: Referring to attached newspaper clipping, beg to submit a few suggestions on the much-agitated bill of lading question. Our Oriental friend, Li Hung Chang is reputed to have remarked that "Gladstone" and "Bismarck" were two of the world's greatest men, but they talked much and did little. This appears to apply very forcibly to those who have been discussing bill of lading reform. To advance a theory which will bring results the most feasible way is to review the present status of issuing these documents, to wit: The forms are handed out to all shippers or their representatives upon application for same. This is a very lax method, and should be discontinued. This does not apply in all cases, but positively does in cases of forgery. My idea is that the forms should not leave the railroad unless as a receipt and contract for transportation; furthermore, that the commodity to be shipped, or its equivalent to the satisfaction of the railroad's representative, should be produced before his signature should be affixed. If necessary the forms could be copyrighted, thereby protecting them with a legal hedge. They should under no circumstances be left lying loose around the office, but should be guarded by some one designated for that purpose. Of course such an innovation would be objectionable to most of the railroads on account of additional expense entailed, results not being considered which at present are not obtained under a great many of the so-called innovations in vogue. Mr. Brandeis is already on record before the public as to a great number of existing conditions.

As to the small agencies, their apparent negligence or lack of ability of the agent in charge; I firmly believe that an educator continuously upon the road would be a boon to the railroad and the shipping public. Results might at first be slow, but would eventually show up to great economic value to the railroads.

Yours, truly,

C. F. OPPERMANN.

PRESENT BILL OF LADING PRACTICES DENOUNCED.

COUNSEL BOARD OF BALTIMORE & OHIO BEFORE COMMITTEE—SOUTHERN RAILWAY
ATTORNEY TESTIFIES FOR ROAD—CALLS ATTENTION TO LARGE FORGERIES.

WASHINGTON, March 1.

General Counsel Bond, of the Baltimore & Ohio Railroad, declared before the Senate subcommittee on interstate commerce to-day that "as compared with holding up taxicabs, the frauds possible under the present bill of lading practices would be a comparatively safe industry."

Mr. Bond was one of a number of railroad attorneys who testified regarding proposed reforms in lading bill methods, designed to safeguard these documents and to hold railroads to strict liability for them. He favored action, but wanted an opportunity first for the counsel in the case to get together and work out detail by detail a satisfactory adjustment as a legislative basis, conserving at the same time the interests of the banks.

General Counsel Thom, of the Southern Railway, also testified for the railroads, calling attention particularly to cotton bills of lading and to large forgeries that have taken place.

Mr. Thom said that liability of the roads for lading bills made out between the agents and shippers, with all the opportunity for collusion between these two individually, would place the railroads in the position of being not only carriers but bankers. He

said that the Southern Railway system had from 1,500 to 2,000 agents of varying ability, intelligence, and character.

He stated that through the southeastern territory, east of the Mississippi and south of the Potomac, the railroads were already cooperating and had established a central bureau at New York, to which the roads forward copies of all lading bills. He said the complaints came from the banks, which felt that a New York bureau of banks consolidated business at New York to the detriment of other lines. He said the roads wanted to cooperate to the fullest extent, but that they should not be liable.

The following telegrams from C. H. Feltman, president Peoria Board of Trade, and C. W. Kimbell, National League Commission Merchants, will be inserted in the record:

PEORIA, ILL., *March 14, 1912.*

HON. MOSES E. CLAPP,
Chairman of Committee on Interstate Commerce, United States Senate:

We would most urgently urge your committee to report out favorably the Pomerene bill of lading bill with the changes proposed by the National Industrial Traffic League, and would also urge that no provision be inserted to allow any added compensation to the railroads for an order bill of lading, for the reason the Interstate Commerce Commission now have authority to grant the railroads the added compensation if it can be shown that they are entitled to it. The whole business interests of the country are entitled to a better and safer bill of lading than the roads now furnish.

C. H. FELTMAN,
President Peoria Board of Trade.

NEW YORK, *March 13.*

HON. MOSES E. CLAPP,
Washington, D. C.

Regarding uniform bill lading hearing March 15, I respectfully request that audience be given John C. Scales, Chicago, and George F. Mead, Boston, who will appear before your committee in behalf of National League Commission Merchants.

NATIONAL LEAGUE COMMISSION MERCHANTS,
C. W. KIMBALL, *President.*

The following letter from Commerce Club, St. Joseph, Mo., will be inserted in the record.

ST. JOSEPH, MO., *March 12, 1912.*

HON. MOSES E. CLAPP,
*Chairman Committee on Interstate Commerce,
United States Senate.*

SIR: Senate bill 4713, Sixty-second Congress, second session, relating to bills of lading in commerce with foreign nations and among the several States is, we understand, before your committee for consideration.

This organization, representing the extensive shipping interests of this community, respectfully and urgently recommends the adoption of this proposed legislation, excepting, however, we would suggest modification thereof as follows:

That section 23, page 11, line 20, be changed by striking out the words "By the improper loading or," and that there be added to this section on line 22, following the word "bill," these words: "Provided, That if the carrier verifies the shipper's statement of property so loaded or refuses so to do upon demand of shipper, he shall not insert the words 'shipper's load and count' in such bill of lading, or words of like purport."

Respectfully, yours,

COMMERCE CLUB,
By H. G. KRAKE, *General Secretary.*

The following letter from J. E. Zahm & Co., Toledo, Ohio, will be inserted in the record.

TOLEDO, OHIO, *March 13, 1912.*

Hon. MOSES E. CLAPP,
Chairman Committee Interstate and Foreign Commerce,
United States Senate.

DEAR SIR: Being large shippers of grain, and meeting much competition and the fact that a carload of wheat at present prices means an investment of over \$1,000, and on corn about the same, we are opposed to any bill of lading that calls for a higher rate of freight when the grain is billed to the shipper's order.

It is absolutely necessary as a protection to bill the grain to our order attaching bill of lading to the draft, and we don't see why one should be compelled to pay more freight on a shipment so billed.

Yours very truly,

J. F. ZAHM & Co.

The following letter from the Paddock Hodge Co., Toledo, Ohio, will be inserted in the record.

TOLEDO, OHIO, *March 13, 1912.*

Hon. MOSES E. CLAPP,
Chairman of the Interstate Commerce Committee,
United States Senate.

DEAR SIR: The grain shippers of the country are probably more vitally interested in the bill of lading hearing than any other class of shippers in the country. Nearly every grain dealer is obliged to use his bills of ladings as collateral at the banks from the time the grain is loaded in Western States until it reaches destination in the East or in the seaboard markets for export, so that the grain shipper and the banks with which he does business, are vitally interested in having the negotiable bill of lading. The railroads charge such high rates and have so few grain losses to pay that we think we are entitled to a negotiable bill of lading on basis of the tariff rates and that no extra charge, such as we understand they propose to make for an "order bill of lading" should be allowed to become a part of the law.

We desire to go on record as demanding a negotiable bill of lading based on current tariff rates on grain, and we trust you will lend your influence as chairman of this committee in the United States Senate to bring about such a result and prevent as far as possible legislation being passed in favor of the railroads and other big corporations. It's time the common people had an "even chance" and "a square deal" in all business pertaining to interstate traffic and commerce of the country.

Yours very truly,

F. O. PADDOCK,
President.

The following letter of Thomas P. Riddle, Lima, Ohio, with resolution, will be inserted in the record:

LIMA, OHIO, *March 13, 1912.*

Hon. MOSES E. CLAPP,
Chairman of Committee on Interstate Commerce,
United States Senate

DEAR SIR: I transmit herewith a copy of a resolution adopted by a conference of millers and elevator operators of northwestern Ohio, northeastern Indiana, and southeastern Michigan, held under the auspices of our association in Fort Wayne, Ind., March 8, 1912, which resolution in effect is an indorsement of Senate bill 4713, relative to bill of lading. We earnestly solicit your consideration.

Yours, very truly,

THOS. P. RIDDLE, *Secretary.*

Resolved, That it is the consensus of opinion of this conference of millers and elevator operators of northwestern Ohio, northeastern Indiana, and southeastern Michigan assembled in Fort Wayne, Ind., this 8th day of March, 1912, that Senate bill 4713, known as the Pomerene uniform bill of lading, in the form now pending for consideration constitutes a wise, sound, and desirable form, and that we recommend its adoption.

THOS. P. RIDDLE,
C. W. MAHAN,
G. B. NEIZER,
Committee.

Unanimously adopted by formal vote of conference.

THOS. P. RIDDLE, *Secretary of Conference.*

The following letter from the Ohio Grain Dealers' Association will be placed in the record:

COLUMBUS, OHIO, *March 13, 1912.*

MR. FRANCIS B. JAMES,
Washington, D. C.

MY DEAR MR. JAMES: I have yours of the 11th and await receipt of the documents in question.

I have given this bill of lading matter a great deal of attention and serious consideration during the past 10 years, and it is my opinion that all interests would be best protected and conserved by the enactment of the Pomerene bill without any material changes.

I am very much opposed to the change which is being considered involving the payment of an increased rate where the carrier assumes full common-law liability. It means but very little as compared with the status which would exist under the provisions of the present Pomerene bill. It would certainly work a hardship on the shipper who does not have very much financial backing or is not possessed of very much property or credit, as the banks in discounting his drafts would perhaps say to him that he must have a bill of lading attached to the draft carrying the greatest possible security, which of course would carry with it increased cost of transportation.

You can readily see how certain branches of business being handled in large volume on order bills of lading would drift into the hands of strong financial concerns and who would be able to have the property transported at the lower rate of freight and carry what little risk would attach under present conditions themselves.

The railroads have no right to impose upon the shipper a charge to cover what they might term extra cost in protecting him as far as possible from forgery and manipulation of an order bill of lading. They can protect these documents without any material cost against ordinary causes, forgery, etc., as easily as they protect their passenger transportation, tickets, etc. I think it is fair to assume that they should be required to exhaust all reasonable resources for so protecting their order bills of lading without imposing a charge on the shipper.

I am firmly of the opinion that the terms of the Pomerene bill are fair to all interests; and as all interests were practically in accord at one time on all the provisions contained in this bill I see no reason at this time for injecting new provisions and conditions.

I sincerely hope that the bill as introduced may be reported by the committee with their recommendation for passage.

Very respectfully, yours,

J. W. McCORD, *Secretary.*

The following letter from the Indiana Grain Dealers' Association will be inserted in the record:

INDIANAPOLIS, IND., *March 13, 1912.*

HON. MOSES E. CLAPP,
Chairman Committee on Interstate Commerce.

DEAR SIR: This association, composed of practically all the grain dealers and millers of the State of Indiana, has for years urged the enactment of such laws as would give us a better bill of lading than obtains at the present time.

We have examined the bill introduced by Senator Pomerene, No. 4713, and believe that it provides for a good bill of lading. I am therefore directed by this association to make our wishes known in this matter and urge the enactment of the bill above referred to into a law, and trust that the same may be accomplished at a very early date.

Very respectfully,

CHAS. B. RILEY, *Secretary.*

The following letter from secretary of the Commercial Exchange of Philadelphia will be inserted in the record:

PHILADELPHIA, *March 15, 1912.*

HON. MOSES E. CLAPP,
Chairman Committee on Interstate Commerce, United States Senate.

DEAR SIR: This exchange has for the past few years used every exertion to forward the passage of proper legislation upon the subject of bills of lading, and has upheld the efforts of the American Bankers' Association in that direction, believing that the interests of the public were well covered in the measures that were approved by that association and by the National Industrial Traffic League. The board of directors of this association has instructed me to communicate to you its hope that the bill introduced by Senator Pomerene, with the amendments that have been suggested by the National Industrial Traffic League, shall meet with your approval and that of your committee, and to say that the Senators from Pennsylvania have been requested to add their support to that measure.

The members of this exchange are most vitally interested in this subject, inasmuch as the great bulk of their trade is transacted through the medium of bills of lading, and, through the use of these bills of lading in their banking operations, the necessity is constantly before them of national legislation to safeguard their transactions and make a bill of lading a readily negotiable and legal document, without doubt as to the liability of the carrier. There is no question before Congress of higher importance than this, as it concerns the entire country so greatly, and we therefore hope most earnestly that something practical will be accomplished during the present session.

I am, yours, very truly,

FRANK E. MARSHALL, *Secretary.*

The following letter from legislative committee of the Grain Dealers' National Association will be inserted in the record:

CRAWFORDSVILLE, IND., *March 15, 1912.*

Senator MOSES E. CLAPP,

Chairman of Committee on Interstate Commerce.

SIR: I confirm having wired you to-day regarding Senate bill 4713, which bill relates to bills of lading. As stated in my night letter, the country grain shippers' interests are not altogether taken care of by the provisions of this bill.

As the matter now stands a shipper loads a car of bulk grain, weighs it very carefully, and asks the railroad company for bill of lading. The bill of lading is issued by the railroad company based on owners' weights. When the car gets to destination the agents of the railroad company weigh the grain, and the shipper is practically compelled to accept the weights as given by them.

It is not an uncommon occurrence for a car thus handled to fall short 100 bushels, and we have known of cases of several hundred bushels, and instances of 10, 20, and 50 bushels are of daily occurrence.

A claim against the railroad for such shortage is met by all sorts of excuses, and if the shipper is not able to show that actual leakage occurred in transit, his claim is rejected, and in fact large numbers of such claims are rejected.

In the present dilapidated state of the railroad companies' equipment, this risk is a very large factor. It is perfectly reasonable and practical for the railroads to furnish weighmasters to weigh all of this grain into the cars, and if they are not willing to do so they should be compelled to accept the shippers' weights as final.

As chairman of the legislative committee of the Grain Dealers' National Association, I have had under consideration for some time this subject, and I am thoroughly convinced that it is not only feasible but reasonable and practical for the railroad company to weigh all grain that they receive in bulk in carloads for transportation.

If there is a likelihood of bill S. 4713 being put on its passage, I should like very much for our committee to be heard in behalf of the country grain shippers.

I am in hearty sympathy with the principal part of bill S. 4713, and am a firm believer that a bill of lading can be made a sound commercial document in which shipper, transportation company, and banker can all be alike protected, but I am very sure that bill S. 4713 does not protect all these interests.

Most respectfully, yours,

A. E. REYNOLDS,

Chairman of the Legislative Committee of the Grain Dealers' National Association.

The following letter from Western Grain Dealers' Association will be made a part of the record:

DES MOINES, IOWA, *March 14, 1912.*

Hon. MOSES E. CLAPP,

Senate Chamber, Washington, D. C.

MY DEAR SIR: The members of the Western Grain Dealers' Association are very much interested in legislation relating to bills of lading. As you no doubt appreciate the fact that it is very important to maintain the integrity of bills of lading in such a manner that shippers may use them as collateral with their bankers, and that if the bill of lading to be thus used by shippers generally should be discredited to any extent whatever, it would materially interfere with commerce and result in a monopoly of the shipping business by the larger corporations.

We are inclined to favor Senator Pomerene's bill, S. 4713, that is now under consideration by your committee, and we desire to ask that you give this matter most careful attention, and work to the end that a law may be enacted as soon as possible along the lines suggested in this bill.

You will perhaps remember me as formerly being a resident of New Richmond, Wis. With kindest personal regards, I am,

Yours, respectfully,

GEO. A. WELLS.

The following letter and draft of resolution from the president of the Board of Trade of Detroit will be placed in the record:

DETROIT, *March 13, 1912.*

HON. MOSES E. CLAPP,
*Chairman Interstate Commerce Committee,
United States Senate.*

DEAR SIR: Please find inclosed draft of resolution on Senate bill 4713.

The position of our board of trade could, of course, be further elaborated, but we desired to be brief and simply to impress upon you that there is a unanimous cry here for safety and fairness in so far as bills of lading are concerned.

Soliciting your efforts in that direction on behalf of the organization which I represent, I am,

Yours, most respectfully,

ARTHUR S. DUMONT,
President Board of Trade of the City of Detroit.

RESOLUTION UNANIMOUSLY PASSED BY THE MEMBERS OF THE DETROIT BOARD OF TRADE IN SESSION MARCH 12, 1912.

Whereas it is the business of this exchange to supervise and regulate the handling of grain received from this and virtually all of the surplus-grain-producing States of the Union; and

Whereas our members, in consideration of the welfare of the western shipper of grain to this market, are obliged to pay drafts representing virtually face value of such shipments, on presentation, such drafts having only railroad bills of lading attached; and

Whereas such bills of lading are positively refused as collateral against loans from local banks, thereby eliminating the element of credit in a manner absolutely unjust and unfair to the middle man; and

Whereas the general business of our members is rendered generally and unnecessarily hazardous by the form of bills of lading which are at present furnished by bills of lading covering outgoing shipments: Therefore be it

Resolved, That we most heartily and unanimously indorse Senate bill 4713, introduced by the Hon. Senator Pomerene, with the following suggestions:

Paragraph B of section 3 be eliminated as presenting a loophole for possible unfair advantages by the railroads.

That section 23, page 11, line 20, be amended by striking out the words "by the improper loading or," and by the addition on line 22, after the word "bill," "Provided, That, if the carrier verifies the shipper's statement of property so loaded or refuses so to do upon demand of shipper, he shall not insert the word 'shipper's load and count' in such bill of lading, or words of like purport."

The argument on this latter amendment being that the value and importance of grain traffic justifies the same degree of care on the part of the railroad in reference to checking as in the instance of all other classes of commodities, and that it is an evil which has crept into present customs for the railroads, after having been availed of the facilities of the grain shippers and elevator owners for the weighing and loading of grain, to in turn adopt that very convenience as an argument against their own responsibility in the premises.

Most respectfully submitted.

BOARD OF TRADE OF THE CITY OF DETROIT,
ARTHUR S. DUMONT, *President*,
H. B. SIMMONS, *First Vice President*,
F. W. BLAIR, *Second Vice President*,
F. W. DEERING, *Secretary*.

The following letter from Mr. George Neville, president New York Cotton Exchange, will be inserted in the record:

NEW YORK, *March 11, 1912.*

HON. MOSES E. CLAPP,
*Chairman Senate Committee on Interstate Commerce,
Washington, D. C.*

MY DEAR SIR: I appeared before the Committee on Interstate Commerce on Saturday, March 2, in support of the Stevens or the Pomerene bill, regarding bills of lading. In the course of my statement I was asked by Senator Townsend which of the two bills

I favored. I told him I had no choice in the matter; all I wanted was relief; but that I thought an amendment could be drawn, of 15 or 20 lines, that would cover the case, and I was asked by the committee to submit that amendment, which I give you below:

An amendment to an act to regulate commerce, to be part of section 20, following line 6, page 29, as per publication of Charles S. Hamlin, Esq., corporation counsel for the Boston Chamber of Commerce, published by Little, Brown & Co., Boston, 1907, being the Carmack amendment:

"The common carrier, railroad, or transportation company, shall post, in a conspicuous place at each station on its line, the name of its or their accredited agent and [or] employees acting for said accredited agent, authorized to sign bills of lading or receipts issued for goods delivered to such common carrier, railroad, or transportation company, for shipment over its or their lines. Any bill of lading or receipt signed by their duly accredited agent or employee shall become a lien on such common carrier, railroad, or transportation company, and such common carrier, railroad, or transportation company shall be liable to a consignee named in a nonnegotiable bill of lading or the holder of a negotiable bill of lading, who has given value, in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier or a connecting carrier, of all or part of the goods described in the bill of lading at the time of its issue."

Yours, very truly,

GEO. W. NEVILLE,
President.

The following letter from Daniel H. Hayne, Baltimore, Md., will be inserted in the record:

BALTIMORE, MD., March 7, 1912.

Hon. MOSES E. CLAPP,

Chairman Committee on Interstate Commerce, United States Senate.

DEAR SIR: I respectfully beg leave to submit a few observations on what is known as the "bankers' bill," relating to the negotiability of the bill of lading, now before your committee. I have not seen a copy of the bill introduced at this session and did not learn of the hearing before the committee until too late to attend.

After a long study of the bill of lading in the actual work of preparing the revised standard bill of lading, now in use south of the Ohio and east of the Mississippi Rivers, and by the coast water lines tributary thereto, I am fully convinced that the carriers are now accepting nine-tenths of the load of responsibility relating to "order-notify" shipments, which are the only shipments involved in the legislation before you.

The "order" clause in the bill of lading requires the carrier to hold the freight covered by the bill of lading until its delivery upon the surrender and cancellation of the original "order" bill of lading properly indorsed. This "order" clause is for the convenience of the banks and the shippers, to enable them to finance their transaction.

This "order" clause contained in the bill of lading is not, per se, a part of the work of transportation. It is a growth which has been joined to the transportation by the voluntary act of the carrier for the purpose of assisting the banks and the public in their financial affairs, and with which the carrier, considered purely as a transporter, is not interested; and for which additional service and responsibility it receives no additional compensation whatever.

The carriers have been generous in assuming the responsibilities of the "order" clause. The mistakes which occur in the transportation, and related to the "order" clause, are numerous, and the carrier has assumed all the load of that responsibility after the goods have been received.

The point involved in the present bill before you is to make the bill of lading fully negotiable so the carrier will be held also for goods which it has not received, and which may be covered by a bill of lading issued beyond the scope of the agent's authority, and, indeed, in direct opposition to instructions to him. The mistakes, errors, or losses growing out of this latter element are negligible, when considered in relation to the great responsibilities which the carriers voluntarily accept in the "order" clause now contained in their bills of lading. But it seems that the banking interests are not satisfied, and want the carrier made responsible for all losses which the lender may sustain.

The result, in passing the bill before you, will be to transfer what should be the lender's share of the responsibility, in dealing with its patron and borrower, to the shoulders of the carrier now greatly oppressed by the burden of the "order" clause.

When a shipment is made to "order," and the carrier has received the goods, it is responsible, under the "order" clause in its bill of lading, for all errors, even those growing out of the laxity of the banks in the failure to inspect the title. Concededly, the lender which trusts its patron and borrower ought to have some responsibility

requiring very careful examination of the patron's or borrower's standing, and the property he offers as collateral, before indorsing such patron or borrower as a man worthy of confidence.

The bill is unfair, and upon examination the true inwardness of it will be found to be an effort on the part of the commercial interests to avoid what is required in all business transactions, namely, an inspection of title before credit is given on the faith of the collateral. There is no difference between the bill of lading collateral or any other collateral, and in no instance is it required that collateral should be made negotiable to underlie another negotiable instrument, namely, the note.

What you are asked to do is to establish two negotiable instruments for the same transaction; one, the note which is now negotiable, and the other, the bill of lading now proposed to be clothed with full negotiability, to accomplish it. You are also asked to strike down the well recognized law announced by the Supreme Court of the United States, namely, that an unauthorized act is a void act, and to establish by statute in the place thereof the principle that an unauthorized act is a valid act, in order to relieve the banks of a very small measure of risk which they ought to properly assume in taking a bill of lading for goods which inquiry would disclose had not been delivered to the carrier.

Since the carrier has added the "order" clause to the bill of lading to accommodate the banks and the public, and has accepted fully nine-tenths of the responsibility of all the errors that grow out of the "order" bill of lading, the lenders ought to be required to inspect "order" bills of lading which they receive to establish, first, that the goods have been received by the carrier (just as all titles to property are tested), and also to protect themselves against the forgeries which have been perpetrated on them by their own patrons, and with which the carrier has had absolutely nothing to do. The two prominent illustrations presented to your honorable committee, viz., the cotton forgeries of the South several years ago, involving millions of dollars, and the recent forgeries of grain bills of lading in Baltimore, do not bear on the bill before you. They were forgeries, pure and simple; that is, bills of lading were manufactured by the patrons of the banks.

It would seem to be in the interests of the banks to insist that inquiry be made on an "order" bill of lading to see whether the property is in the hands of the carrier, and it will not aid the banks to let them rest in fancied security that because a bill of lading is made fully negotiable they have no further inquiries to make regarding it.

Indeed, the action taken recently by the Baltimore financial interests, shown in the inclosed clipping from the Baltimore American of February 25, 1912, illustrates that effort is being made in the proper direction, namely, inquiry by the banks on a form to the carriers, and you will notice at the end of the clipping that the banks do not anticipate that more than 20 per cent of the shipments will be from remote territory causing any delay. Even this delay would not be considerable.

This is as it should be, and if this matter is left to the business judgment of the bank and the carriers it will be solved along proper lines and will not require the revolution in the law as proposed.

Taking all the cases which have occurred in the past 20 years, the percentage for which the carriers can now be held will amount, as indicated, to fully nine-tenths of the errors which occur. It is extremely rare that there is any loss due to the issue of a bill of lading before the receipt of the goods, and even as to this responsibility the banks have absolute protection in the method of inquiry indicated in the inclosed clipping.

If the banks are required to make these inquiries to protect this small possible risk, it will serve to guard against the very grave forgeries which have occurred in the past, and will also prevent certain laxity in inspection of the borrower and his collateral, which has occurred, and which is now occurring. Indeed, so loose has been the inquiry in the past, that straight bills of lading, without the "order" clause, and bills of lading not signed at all, have been accepted as collateral by the lender.

I should be very glad to appear before your committee and trace out the history and the development of the bill of lading with reference to commercial credits, if you should desire it.

Respectfully submitted.

DANIEL H. HAYNE,
*Formerly Chairman Subcommittee,
Revised Standard Bill of Lading.*

P. S.—I inclose a copy of the revised standard order bill of lading with the "order" clause marked, showing that so much of the negotiability as may be required, mounts up to cover all the requirements of the "order" clause. What more could a lender require of a carrier which has adopted this bill of lading and included such an "order" clause for the benefit of the commercial interests without any extra compensation whatever?

STANDARD FORM—ORDER BILL OF LADING.

Arrangement of colors and forms in manifolding, on shipments consigned "to order;" (1) Shipping order (blue); (2) bill of lading (yellow); (3) memorandum (blue).

— COMPANY.

ORDER BILL OF LADING—ORIGINAL.

Shippers No. —. Agents No. —.

Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, —, at —, 19—, from —, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its —, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns.

This bill of lading is assignable; it is negotiable only in so far as may be required to carry out the promise of the carrier made in the following surrender clause, and is enforceable as provided in section 10 of this bill of lading, according to its original tenor and effect.

The surrender of this original order bill of lading, properly indorsed, shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

The rate of freight from — to — is in cents per 100 pounds:

If — times, first class.	If first class.	If second class.	If rule 25.	If third class.	If rule 26.	If rule 28.	If fourth class.	If fifth class.	If sixth class.	If class A.	If class B.	If class C.	If class D.	If class E.	If class H.	Per barrel, if class F.	If special, per

Consigned to order of (mail address—not for purposes of delivery), —. Destination, —, State of —, County of —. Notify —, at —, State of —, County of —. Route, —; car initial, —; car no. —.

Num- ber pack- ages.	Description of articles and special marks.	Weight (subject to cor- rection)	Class or rate.	Check column.	If charges are to be prepaid, write or stamp here. "To be prepaid" —. Received \$—, to apply in prepay- ment of the charges on the property described hereon, —. Agent or cashier, per —. (The signature here acknowledges only the amount prepaid.) Charges advanced: \$—

—, Agent.
Per —.

The following letter from the Toledo Grain & Milling Co., Toledo, Ohio, will be inserted in the record:

TOLEDO, OHIO, *March 12, 1912.*

HON. MOSES E. CLAPP,
Chairman, Washington, D. C.

DEAR SIR: We are vitally interested in the bills now pending in reference to the character of bills of lading that railroads are to give shippers as a receipt for goods offered for transportation.

We ask that you use every effort possible in advocating the necessity of a uniform order bill of lading that will carry with it a guarantee of the proper delivery of shipments, and furthermore, that such shipments be handled at a common rate. By this we mean that no shipper be allowed a reduced rate where he releases the railroad against losses that are common to common carriers.

We would appreciate a firm stand on your part in reference to these points.

Respectfully,

TOLEDO GRAIN & MILLING CO.,
D. W. CAMP, *President.*

The following letter from the St. Joseph Board of Trade will be inserted in the record:

HON. MOSES E. CLAPP,
*Chairman Committee on Interstate Commerce,
United States Senate.*

SIR: This organization, representing one of the important primary grains markets in the West, respectfully urges upon your committee a favorable report on Senate bill 4713, Sixty-second Congress, second session, relating to bills of lading in commerce with foreign nations and among the several States; excepting, however, that we urgently recommend modification thereof as follows:

That section 23, page 11, line 20, be changed by striking out the words "By the improper loading or," and that there be added to this section on line 22, following the word "bill," these words: "Provided, That if the carrier verifies the shipper's statement of property so loaded or refuses so to do upon demand of shipper, he shall not insert the words 'shipper's load and count,' in such bill of lading, or words of like purport."

The present laws governing bills of lading for shipments of general merchandise, grain, and its products, to foreign countries and among the several States are inadequate to fully protect the merchants and bankers. The lack of a proper security in the nature of bills of lading has served to depreciate the value of the product to the producer. Therefore, in our opinion some action to improve this condition is greatly needed. We believe that the bill referred to above, with the changes suggested, would meet the requirements of commerce.

Respectfully,

ST. JOSEPH BOARD OF TRADE,
By F. FREDERICK, *Secretary.*

The CHAIRMAN. We will now resume the hearing on bills calendar 7 and 29, being uniform bill of lading.

Have you concluded, Senator Faulkner?

Mr. FAULKNER. We have concluded, except that Mr. Thom, the general solicitor of the Southern Railway Co., had desired to make some observations here with reference to a question that came before the committee, but he was unfortunately called on a very important meeting to New York to-day and therefore will not be able to be here. Otherwise we have concluded everything we desired to submit to the committee.

The CHAIRMAN. Have you anyone this morning that you desire to be heard?

Mr. FAULKNER. We have not, but the gentlemen on the other side are prepared to go on with their case.

The CHAIRMAN. Mr. McDougal, we will be glad to hear you.

STATEMENT OF ROBERT M'DOUGAL, OF KNIGHT & M'DOUGAL, OF CHICAGO AND NEW YORK.

Mr. McDUGAL. I should introduce myself as Robert McDougal, of the firm of Knight & McDougal, of Chicago and New York. I appear here primarily in the interests of the public.

I am also the accredited representative of the Chicago Board of Trade. I am also here at the urgent request of some of the banking interests of Chicago. My purpose, gentlemen, is to introduce some evidence illustrating modern-day abuses in bills of lading.

We, as a firm, are located at Chicago and at New York. I am in the West, and my partner is in New York.

In the early part of 1910 we advanced a sum of money, in round numbers, of about \$212,000.

Senator CLARKE. State what kind of business you are in.

Mr. McDUGAL. We are in the grain business. We are shippers. We are in the business of grain shipping.

In the early part of 1910 we made advances of about \$212,000 to a firm of Albany, N. Y., on bills of lading. Those bills of lading could be, for convenience and brevity, divided into two classes: The first class represent shipments from Chicago all rail and shipments from Buffalo to the East arriving in Buffalo originally by water. The other shipments are shipments that came forward all rail from Albany.

Now, in a nutshell, after advancing this sum of money the firm to whom we had advanced it at Albany failed. We thereupon relied upon our collateral as security for our loans, but we found that there was no grain back of those bills of lading. The grain from the West we found instead of awaiting our claim as the owner of the original bills of lading had been converted by the Delaware & Hudson Railroad Co., which had issued other bills of lading, without regard to our bills, and turned those bills over to other interests, who had in that way secured the grain and the money. We are left in the position of collecting by force through the courts from the Delaware & Hudson Railroad Co. the amount of our advances on those bills of lading.

We are in the same predicament with regard to the bills of lading on the other class.

I am going to recite that on those bills of lading of this class that we advanced, on 150,000 bushels of corn, the sum of \$92,000, leaving out the odd figures. On 97,500 bushels of oats we advanced \$44,000 and on 15,000 bushels of rye we advanced the sum of \$10,700.

As I say, we are making an effort to collect this money from the road.

These bills of lading on which these advances were made were issued by the Delaware & Hudson Railroad Co. at Albany and signed by their accredited agent. Now, the railroad company has repudiated its obligations, and while they made some overtures which led us to suppose that they would like to compromise, they do not pay. They have played the part of the thug. They took our actual grain from the West—I believe you call it in law conversion, the act of conversion—and we can get no satisfaction from them whatever.

I think it is this defiance of common honesty on the part of the railroad managements that is accountable for so much of the clamor against roads. There never was a more equitable claim in the world

than ours. So far as we can find out, they set up no defense; they have no defense to offer except the claim is very large and they do not want to pay it. They have repudiated their obligations.

That is about the substance of the entire matter. As I say, I was asked to present this testimony as of vast importance to the whole West that has anything to do with the handling of grain. We handled \$700,000,000 of actual commodities on the board of trade last year, all of which was done by bills of lading, and if our business is a criterion, then all of that business must stop.

That is all.

Senator CUMMINS. Have you the bills of lading or copies of them with you?

Mr. McDOUGAL. No, sir; I have not those here.

Senator CUMMINS. Where are they? Are they accessible?

Mr. McDOUGAL. Well, they are in New York. I might say that I came down here on very short notice. This business is now on trial in New York, and my partner, who handled all that business at that end, is so busy that he could not possibly be here.

Senator CUMMINS. Bills of lading were issued by the Delaware & Hudson Railroad Co.?

Mr. McDOUGAL. The bills of lading that I have referred to here in the second class were issued at Albany by the agent of the Delaware & Hudson Railroad Co.

Senator CUMMINS. And they acknowledged the receipt of this quantity of grain?

Mr. McDOUGAL. They acknowledged it in that class, Senator, the receipt of the grain described in the bill.

Senator CUMMINS. Did the road actually receive the grain?

Mr. McDOUGAL. I can not tell whether they did or not. Their contention is that in that section they did not. But if we apply the principle that they have applied to this grain that we shipped from the West, nobody on earth could tell whether they received it or not. They took this large amount of grain which I have described, and irrespective or regardless of the bills that were outstanding on which we had advanced our money, and they issued new bills on that grain and that grain was taken away from us without any lawful procedure. So when we ask whether they have the actual grain or not, on what we call these Palmer bills of lading, they could never tell. We couldn't find any grain anywhere.

Senator CUMMINS. What carrier actually issued the bills of lading on which you advanced your money?

Mr. McDOUGAL. The bills of lading, in what I call section No. 2, were issued by the Delaware & Hudson Railroad Co.

Senator CUMMINS. Where did you ship the grain from and to what point?

Mr. McDOUGAL. We were not the shippers; we were financing it for the shipper at New York. The shipper of that grain ostensibly shipped from the West, but the bills of lading—the Delaware & Hudson Railroad Co. bills of lading—as I recall the details, give the car numbers and say how much grain those cars contain.

I will have to refer to a substitute witness about those facts. But those so-called Palmer bills of lading were supposed to refer to other shipments from the West that we had nothing to do with bringing forward up to that time.

Senator CUMMINS. How were the bills of lading issued?

Mr. McDUGAL. They were issued to the firm of Durand & Elmore Co., at Albany. That was the firm which drew on us.

Senator CUMMINS. You do not know whether the company ever received any grain or not?

Mr. McDUGAL. We do not know whether, on these bills, they did or not. We do know in the other case.

Senator CUMMINS. Were there any conflicting bills of lading on that other grain?

Mr. McDUGAL. No, sir.

Senator CUMMINS. The question, then, is simply whether the Delaware & Hudson Railroad Co. received the grain, or had any grain of that kind when they issued those bills of lading?

Mr. McDUGAL. That may be a question, but under the law of our State it does not allow them to repudiate their obligation, whether they received the grain or not.

Senator CUMMINS. I understand that, but I was trying to get at the real issue between you, because you do not know whether they ever did receive the grain.

Mr. McDUGAL. We can not prove those. In section 1 we do know that they received the grain, and have the dates on which they received it.

Senator CUMMINS. What did they do, if they received it?

Mr. McDUGAL. They issued other bills of lading to other people.

Senator CUMMINS. On the same cars of grain?

Mr. McDUGAL. On exactly the same cars. It is a common theft. That is the only explanation of that procedure.

Senator TOWNSEND. A common what?

Mr. McDUGAL. I would call it a common theft if I was dealing with another man and he did the same thing; I couldn't call it anything but a common theft.

Senator CUMMINS. Have you seen the conflicting bills of lading or the subsequent bills of lading?

Mr. McDUGAL. I have not, Senator Cummins, because I say I am the only one of that firm who found it possible to appear here for these interests, and the details are in New York in the court.

Senator CUMMINS. Does the railroad company simply refuse to pay, or does it say that it is not liable under those circumstances?

Mr. McDUGAL. It has refused to pay. I do not know whether they claim they are not liable or not. Our case is now being heard and has not got far enough to see what they do claim.

Senator CUMMINS. If they acknowledge their liability and refuse to pay, this bill will not help you.

Mr. McDUGAL. One of our counsel, who is here, could answer that for you.

Senator CUMMINS. That is all.

Senator CLARKE. What kind of a piece of paper did the man bring you who wanted to borrow money from you, or in order to secure an advance from you?

Mr. McDUGAL. An order bill of lading.

Senator CLARKE. Made out by what company?

Mr. McDUGAL. These bills of lading that I have described as lot No. 2 were made out by the Delaware & Hudson Railroad Co.

Senator CLARKE. Agreeing to carry what?

Mr. McDUGAL. Agreeing to transport this grain.

Senator CLARKE. How much grain, and from what point did they propose to take it, and to what point did they propose to deliver it?

Mr. McDOUGAL. They agreed to transport that grain——

Senator CLARKE. You took the face of the bill of lading as it was presented to you as the basis of the security for the loan that they sought?

Mr. McDOUGAL. Yes, sir; They agreed to transport it from New York.

Senator CLARKE. From where?

Mr. McDOUGAL. From Albany, N. Y.

Senator CUMMINS. And presented that kind of a document for the advancement on it?

Mr. McDOUGAL. Yes, sir.

Senator CLARKE. And you made the advancement?

Mr. McDOUGAL. Yes, sir.

Senator CLARKE. What got the matter with that paper or that evidence? Why wasn't that document valid according to its purport?

Mr. McDOUGAL. That is the question the railroad company is trying to make answer to us now.

Senator CLARKE. What defense do they set up?

Mr. McDOUGAL. The case has just begun.

Senator CLARKE. They must have told you something. You must have presented your claim to some agent of the company and he must have told you something.

Mr. McDOUGAL. There is a similar case that has been——

Senator CLARKE. Do not let us take a similar case. Let us get at this one. What did he say to you when you either demanded the delivery of the grain or the payment for it?

Mr. McDOUGAL. What did who say?

Senator CLARKE. The railroad people at the end of the route.

Mr. McDOUGAL. They said there was no grain there.

Senator CLARKE. That they had never received it at all?

Mr. McDOUGAL. I do not know whether they said that or not.

Senator CLARKE. It is just a disputed question. There isn't anything in the law that could help you about that.

Mr. McDOUGAL. Some of this grain had arrived.

Senator CLARKE. You say your lawyer understands your case better than you do?

Mr. McDOUGAL. Yes, sir.

Senator CLARKE. I will wait and ask him.

Mr. McDOUGAL. There is no argument about that.

The CHAIRMAN. Is your lawyer here?

Mr. McDOUGAL. Yes, sir.

The CHAIRMAN. We will hear him.

There being no further questions, Mr. McDougal was thereupon excused.

**STATEMENT OF SANFORD ROBINSON, ATTORNEY AT LAW,
NEW YORK CITY, N. Y.**

The CHAIRMAN. Give your name, residence, and occupation to the reporter.

Mr. ROBINSON. Sanford Robinson, attorney, practicing at 59 Wall Street, New York.

Mr. Chairman and gentlemen, I came down here with Mr. McDougal. I did not expect to appear before this committee. I am trying my case before the court now, but I would be very glad to state what the issues are.

The firm of Knight & McDougal advanced on two classes of bills. In the first class they had grain that came lake and rail from the west, or all rail from the west, and when that grain came to the junction point of the Delaware & Hudson Railroad Co. to be turned over to the other railroad, their agent at Albany permitted Durand & Elmore, at Albany, to have possession of that grain without the surrender of the bills of lading, and then the Delaware & Hudson Railroad Co. issued other bills of lading for that grain to Durand & Elmore, and the grain was sent east to other people, and we find no grain behind our ladings. That is one class.

Senator CLARKE. You speak about the junction point. You had better state what that is. You know so much about that that it would help us along to know what a junction point is.

Mr. ROBINSON. By a junction point I mean a point where one railroad joins with another railroad.

Senator CLARKE. Yes; we understand that; but you state at the junction point of the Delaware & Hudson Railroad Co. What are the junction points?

Mr. ROBINSON. The junction points of the Delaware & Hudson Railroad Co. are Binghamton and Oswego. At one or the other of these two cities the Delaware & Hudson Railroad Co. joins with the Lehigh Valley Railroad or the Delaware, Lackawanna & Western Railroad or other western roads.

Now, as to the second class of these bills, the railroad contends—

Senator CLARKE. What is the second class? You have not told us what the second class is.

Mr. ROBINSON. The second class is bills of lading issued by the Delaware & Hudson Railroad Co. at Albany to carry grain to New York points.

Senator CLARKE. Consigned to whom?

Mr. ROBINSON. Consigned to Knight & McDougal.

Senator CLARKE. And shipped by whom?

Mr. ROBINSON. Shipped by Durand & Elmore, who drew on Knight & McDougal for amounts not representing in their value what the value of the grain was, but the value of the grain less a reasonable margin.

Now suit was brought on these bills after an attempt had been made to secure payment in July, 1910, and the case worked its way along on our calendars, and the railroad applied to have a referee to try the case, and that was granted, and the case is now being tried before a referee. The Delaware & Hudson Co. has filed an answer, of course, and are defending this claim.

Senator OLIVER. On what ground?

Mr. ROBINSON. Well, I can say that the pleadings—

The CHAIRMAN. Can you not state what defense they set up so as to get at the gist of the matter?

Senator OLIVER. I would like to have you state what the defense is.

Mr. ROBINSON. In the first place they claim that they do not get any grain at all under the second class of bills. They do not set that

up under the first, but under the second class they contend that they do not get any grain at all. They also contend that the authority of their agent, while he remained agent at Albany, to sign grain bills was taken away some time before these bills were issued, and they also claim that we had made the shipper at Albany our agent for all purposes, and then they say that they do not know whether we get any advances or not, and they do not know whether we had full knowledge of what was going on—and all the defenses that can be made to any suit that anybody wants to set up. They filed a perfectly good answer. The Delaware & Hudson has filed an answer which is perfectly good in law, and the case is now being tried on that issue.

Senator CUMMINS. The first class of shipment that you refer to represents shipments of grain from the West?

Mr. ROBINSON. Yes, sir.

Senator CUMMINS. Destined to New York?

Mr. ROBINSON. Yes, sir.

Senator CUMMINS. And the bills of lading were issued in the West on those shipments?

Mr. ROBINSON. They were issued by the railroad at the point of origin.

Senator CUMMINS. And did those bills of lading fall into the hands of some persons who have advanced money on them?

Mr. ROBINSON. The bills of lading were obtained by the shippers, Durand & Elmore, who sent them to Knight & McDougal, and Knight & McDougal advanced money on those bills, and still hold the bills. Their advances were unpaid.

Senator CUMMINS. I understood you to say that grain came through?

Mr. ROBINSON. No; I say there was real grain behind the bills, but we did not get it. The railroad gave it to somebody else.

Senator CUMMINS. In that case, were the original bills of lading order bills of lading?

Mr. ROBINSON. They were regular order bills of lading, on the regular standard form.

Senator CUMMINS. Were they surrendered at this junction point where the Delaware & Hudson took the grain?

Mr. ROBINSON. The bill of lading would not be surrendered at the junction point, because the shipment was a through shipment. The bill of lading has never been surrendered.

Senator CUMMINS. You say the railroad companies delivered that grain to Durand & Elmore at this place and issued through bills of lading?

Mr. ROBINSON. What I meant to say was that the western railroad delivered the grain to the Delaware & Hudson at the junction point, and then the Delaware & Hudson received under a regular waybill, and when the Delaware & Hudson got it, and it reached only a point on the Delaware & Hudson line, then the Delaware & Hudson gave that at that point to Durand & Elmore without the surrender of the bills of lading.

Senator CUMMINS. Then so far as this matter is concerned the bills here do not cover such a case as that, I take it.

Mr. ROBINSON. I do not think there is any law necessary.

Senator CUMMINS. Where the company actually delivered grain—certainly the first of these bills does not cover the case where the rail-

road company actually delivers the grain to somebody else at the point of destination.

Mr. ROBINSON. I think you are right in assuming that there is sufficient law everywhere to cover that point.

Senator CUMMINS. The second class of cases is where the second bills of lading are bills that were issued by the Delaware & Hudson at Albany?

Mr. ROBINSON. Issued by their agent at Albany.

Senator CUMMINS. Without receiving any grain at all?

Mr. ROBINSON. And they contend that they received no grain at all, and we have not been able to find that they did receive any.

Senator CUMMINS. Those were, then, simply fraudulent bills of lading?

Mr. ROBINSON. They have been characterized as such.

Senator CUMMINS. And your interest in this matter, then, is to have the law so changed that the Delaware & Hudson becomes liable to the holders, or holder, of these bills of lading without regard to whether it received the grain or not?

Mr. ROBINSON. We think that under the New York law—that is, the law there to-day—that that would be a very wise law to have everywhere.

Senator CUMMINS. I understand the matter now. That is all I care to ask.

Senator LIPPITT. What is the business of the firm that advanced this money?

Mr. ROBINSON. Knight & McDougal are grain brokers and shippers, with one office at Chicago and another office at New York. They are doing business on the Chicago Board of Trade and the Produce Exchange of New York.

Senator LIPPITT. How much capital have they invested in the business?

Mr. ROBINSON. I think that their capital was something over \$300,000, and \$200,000 of it has been tied up in this.

Senator LIPPITT. Durand & Elmore—were they the original shippers of the grain?

Mr. ROBINSON. Yes, sir; Durand & Elmore is a very old firm of grain brokers. Durand & Elmore Co. at the time of their failure was a corporation, but that corporation succeeded a very old firm of grain brokers, who had for years and years been doing a very big business, with offices at Albany and elsewhere, in the cash grain.

Senator LIPPITT. When did Durand & Elmore fail? Did they fail in connection with this transaction?

Mr. ROBINSON. They failed in connection with this transaction. You will hear from other sources that one bank at Albany—the First National—lost some \$80,000; that another bank at Albany—the Commercial—had lost around \$400,000, and another grain broker from New York, who is here, has obtained a judgment on this second class of claims against the railroad company for \$90,000.

Senator LIPPITT. Did Durand & Elmore finally get this grain?

Mr. ROBINSON. Our first class is the only case where it has been established that there was any actual grain.

Senator LIPPITT. Do you mean that Durand & Elmore got bills of lading at the point of origin without any actual grain at all?

Mr. ROBINSON. Well, it is difficult for me to answer as to things that are not knowledge first hand, but such investigation as I have been able to make leads me to believe that Durand & Elmore Co. would go to this freight agent, Palmer, of the Delaware & Hudson at Albany, and get what services they required. They could get ladings signed up to any extent they wanted, and get delivery of the grain, or anything that they asked them to do.

Senator LIPPITT. Then you rather imply that there was a fraudulent transaction on the part of others than the railroad?

Mr. ROBINSON. Well, Durand & Elmore must, of course, have been involved with the agent. In other words, the agent did not issue or put out those bills. They were put out by Durand & Elmore.

Senator LIPPITT. The benefit of this transaction, if there was any, went to Durand & Elmore, in your view of the case?

Mr. ROBINSON. They were the people who got the money for nothing.

Senator LIPPITT. And the agent of the railroad was in collusion with them?

Mr. ROBINSON. I do not see how he could be other than in collusion.

Senator LIPPITT. You say there is going to be other testimony in regard to the details of this case?

Mr. ROBINSON. There is a grain broker and shipper, Otto Keusch, from New York, who has had the same sort of case as our second class, and he has personal knowledge of all these things. He obtained a judgment in a case last June similar to our second class.

Senator CLARKE. Do those western bills of lading contain a provision for stopping it in transit for the purpose of its being milled? Was that the purpose of its being stopped at Albany?

Mr. ROBINSON. I understand that there was a general order between the Delaware & Hudson Co. and Durand & Elmore to stop the Durand & Elmore Co.'s grain at New York.

Senator CLARKE. For what purpose? To convert it into products?

Mr. ROBINSON. They had to divert it—

Senator CLARKE. And that was the purpose of stopping it at that point, so that when it went out it went out as another commodity—it came in as wheat and went out as flour, for instance?

Mr. ROBINSON. They had to divert it there. In other words, Durand & Elmore would have a great volume of grain coming through consigned to Boston or Albany or other eastern points. When it got to Oneonta it would be stopped for instructions as to whether it should go to Glens Falls or to some other point.

Senator CLARKE. The fault of the railroad was in giving a new bill of lading for that particular shipment without taking up the old one; so they had out two bills of lading as against one shipment?

Mr. ROBINSON. Yes, sir.

Senator CLARKE. That is quite a common thing in connection with these milling en route privileges?

Senator TOWNSEND. When did these first transactions—referring to the first class of cases—originate?

Mr. ROBINSON. The bills of lading were dated mostly in January.

Senator TOWNSEND. Of this year?

Mr. ROBINSON. No, sir; 1910. This thing happened in the spring of 1910.

Senator TOWNSEND. What relation did you sustain to Durand & Elmore?

Mr. ROBINSON. I sustained no relations whatever to Durand & Elmore.

Senator TOWNSEND. Well, your company that you represent?

Mr. ROBINSON. They advanced money to Durand & Elmore on these bills of lading and handled their grain for them at New York. They were regular brokers in the business, and would have grain consigned to them, and sell it or export it, as required.

Senator TOWNSEND. So Durand & Elmore were in the nature of purchasing agents for Knight & McDougal?

Mr. ROBINSON. No, sir; not at all. We were brokers for them and received our commission for rendering them service.

Senator CUMMINS. With regard to these instances of loss, I think the only materiality of that kind of testimony is to show that the losses have been of sufficient magnitude to claim some sort of remedy. I hope you will accumulate them and get them in as briefly as possible.

There being no further question, Mr. Robinson was thereupon excused.

STATEMENT OF THOMAS B. PATON, LAWYER, NEW YORK, GENERAL COUNSEL OF THE AMERICAN BANKERS' ASSOCIATION.

Mr. PATON. Mr. Chairman and gentlemen, I appear at this particular time because I have here, received from the National Commercial Bank of Albany, who loaned money to the Durand & Elmore firm, two original bills of lading, one of each class referred to by the last speaker, copies of which I desire to put in evidence. One of these classes of bills was false bills, signed by Palmer, the agent of the Delaware & Hudson Co. at Albany, and upon which no goods had been received. According to a statement written by the president of the bank, which I will put in evidence—and which I will not read unless it is desired—it was the habit of this Palmer to go to the Durand & Elmore office, sign up a pair of bills of lading in blank, and leave them in that office, and they would fill them out as they needed them. That is one kind of bills of lading.

Here is the original of that first class [indicating], signed by Palmer without the goods having been received. That is an original sample. All told, the National Commercial Bank of Albany loaned, and will lose, \$175,000 on this class of bills, unless they are able to recover that amount from the Delaware & Hudson Co. This bill is dated Albany, February 16, 1910, and is on the regular new uniform order bill of lading blank.

The other class of bills are those which were issued for genuine grain, in the first instance, by the Delaware, Lackawanna & Hudson Railroad Co. at Buffalo. These bills of lading were loaned on by the National Commercial Bank, and the grain represented by these bills of lading were delivered to the Delaware & Hudson Co., who failed to take up the original bill of lading, leaving it outstanding in the hands of the bank. The Delaware & Hudson Co. would then issue another bill of lading. That is the explanation of that transaction. On this class, as I understand from the statement of the bank, they lost nearly \$200,000.

Without making this statement any longer, I will simply ask leave to put in the letter of the bank stating these facts, together with copies of the two bills of lading. They are identical with the originals.

The papers referred to are as follows:

NATIONAL COMMERCIAL BANK,
Albany, N. Y., March 12, 1912.

MY DEAR MR. PATON: I inclose herewith two bills of lading, on one of which I have pinned a paper marked "No. 1" and on the other a paper marked "No. 2." Our experience with these was as follows:

First, No. 1. This bill of lading is signed by H. C. Palmer, agent, Delaware & Hudson. Mr. Palmer had been signing the Delaware & Hudson bills of lading for a great many years as agent. This fact was known to the community at large and to every bank in Albany. Somewhere in the early part of February, 1910, the officials of the Delaware & Hudson Railroad became aware of the fact that something was wrong in the dealings between their agent, Mr. Palmer, and the Durant & Elmore Co. They took the matter up with the Durant & Elmore people and then deprived Mr. Palmer of his right to sign grain bills of lading, but still left him as agent of the road. There was no public notice that Mr. Palmer's authority to sign grain bills of lading had been taken away from him and his authority to sign all other bills of lading was continued as before. We, as a bank, continued to take the notes of the Durant & Elmore Co., or drafts on various grain dealers, secured by bills of lading of the Delaware & Hudson signed by their agent, up to March 15, at which time Mr. Palmer was discharged from the railroad. It appears that it had been Mr. Palmer's custom to leave a number of pads of bills of lading in the Durant & Elmore office and occasionally when he was in there to sit down and sign up a whole pad of them at one time, leaving them, signed in blank, with the Durant & Elmore Co. They then filled in the numbers of certain cars which they kept on a car index, attached them to drafts and notes, and discounted those papers at the bank. It further appears that this custom had been going on for a great many years; that a very large proportion of the bills of lading which Mr. Palmer had signed had represented no value whatsoever; that the Durant & Elmore Co. had been kept alive by this means, for having various bank accounts they could take up drafts in one place by drawing on another, at which they had obtained a credit in the same manner.

We have presented our bills of lading to the railroad and demanded the goods. They refused to deliver any goods to us or to reimburse us for the loss. The bills of lading, as you see, are on the uniform negotiable bill of lading form, and we are at present suing the Delaware & Hudson Railroad to recover the loss sustained by this fraud.

Bill of lading No. 2 was issued originally by the Delaware, Lackawanna & Western Railroad for grain shipped from Buffalo. It was likewise issued on the uniform negotiable bill of lading form and the signature is genuine, and it was issued for goods actually shipped. These goods, however, were delivered by the Delaware & Hudson Railroad to other parties without demanding the surrender of the original negotiable bill of lading, the original being left in the hands of the Durant & Elmore Co. Their procedure in this case was to hold these originals until they needed some money, when they would carefully change the date, attach them to a note or draft, and discount that note or draft at a bank. The changing of the date on a bill of lading has been claimed by some to be a material change, but both before and since the failure of the Durant & Elmore Co. we have made a very careful study of this question, and find that it is a very common practice for the agents to change the date. I should say, in general terms, that a quarter of the valid bills of lading which we have examined since the failure of the Durant & Elmore Co. have had their dates changed. The reason for this is plain and quite familiar to anybody who has had experience in shipping goods. The shipper will come to the railroad office and will say that he will ship so many cars of grain, or whatever the commodity may be, that afternoon. He may then get delayed for some reason or other and possibly not ship them for two or three days. In the meantime, the agent gets his bills of lading ready and holds them for the shipper, changing only the date when he finds that the shipment has been delayed.

In neither of these cases can the banks sustain any loss if the railroad is held to the contract which its agent signs. The case No. 1 is perfectly plain. Case No. 2 would have been likewise impossible if the Delaware & Hudson agent had taken up the Delaware, Lackawanna & Western bills of lading before delivering the goods covered by the bill of lading.

I wish to say in this failure there were something like nine banks and two large and a number of small grain concerns who lost a total of about \$1,200,000.

Please be sure and return the bills of lading to me, as they are needed in our case which we have started for the recovery from the railroads. If there is any matter which I have not made plain in my letter, telephone me to-morrow morning and I will be glad to give it to you.

Very truly, yours,

J. H. PERKINS, *President.*

MR. THOMAS B. PATON, *New York City.*

No. 1.

[Uniform bill of lading—Standard form of order bill of lading approved by the Interstate Commerce Commission by order No. 787 of June 27, 1908.]

THE DELAWARE & HUDSON CO.

ORDER BILL OF LADING—ORIGINAL.

Shippers No. ——. Agents No. ——.

Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, ——— at Albany, February 16, 1910, from Durant & Elmore Co., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

The rate of freight from ——— to ——— is in cents per 100 pounds.

If—times first.	If first class.	If second class.	If rule 25.	If third class.	If rule 26.	If rule 28.	If fourth class.	If fifth class.	If sixth class.	If special per—	If special per—

Consigned to order of Durant & Elmore Co. (Mail address—Not for purposes of delivery.) Destination, Boston, Mass. Notify Durant & Elmore Co., Boston, care of W. T. La Moure, foreign freight agent. Insured in elevator. Route, by railroad company. Car initial ——. Car No. ——.

Number of pack- ages.	Description of articles and special marks.	Weight (subject to correction).	Class or rate.	check col- umn.
	14 cars of oats..... Bus. 68347 BO..... 1,500 60284 CS..... 1,500 24128 GN..... 1,500 25388 CGW..... 1,500 528322 PFW..... 1,500 9826 Big 4..... 1,500 35110 NE..... 1,500 60154 OLNL..... 1,500 21662 NW..... 1,500 62704 C..... 1,500 45783 MC..... 1,500 87750 NY NH..... 1,500 9322 SooL..... 1,500 16233 MP..... 1,500	21,000 bus.		
				If charges are to be prepaid, write or stamp here, "To be pre- paid."———Received \$—— to ap- ply in prepayment of the charges on the property described hereon. ——— Agent or cashier. Per ———. (The signature here ac- knowledges only the amount prepaid.) Charges advanced: \$——.

(Stamped:) The D. & H. Co. Freight office, Feb. 16, 1910, Albany, N. Y., Livingston Ave.

Freight prepaid.

Durant & Elmore Co., shipper. Per M. A. BULGER.

H. C. PALMER, *Agent*.

(This bill of lading is to be signed by the shipper and agent of the carrier issuing same.)

[Uniform bill of lading—Standard form of order bill of lading approved by the Interstate Commerce Commission by order No. 787 of June 27, 1908.]

No. 2.

THE DELAWARE, LACKAWANNA & WESTERN RAILROAD CO.

ORDER BILL OF LADING—ORIGINAL.

Shippers No. ——. Agents No. ——.

Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, ——— at Buffalo, N. Y., April 26, 1910, from Durant & Elmore Co., the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

The rate of freight from Buffalo, N. Y., to Portland, Me., is in cents per 100 pounds:

If—times first.	If first class.	If sec- ond class.	If rule 25.	If third class.	If rule 26.	If rule 28.	If fourth class.	If fifth class.	If sixth class.	If special per 100.	If special per —.
—	—	—	—	—	—	—	—	—	—	—	—

Consigned to order of Durant & Elmore Co. (mail address—not for purposes of delivery). Destination, Portland, Me. Notify Durant & Elmore Co. at Albany, N. Y. Route, via Binghamton and Albany. Car initial, D. L. W. Car No. 38487.

Num- ber of pack- ages.	Description of articles and special marks.	Weight (subject to correction).	Class or rate.	Check col- umn.	
1,500	Bushels oats.....	48,000	—	—	If charges are to be prepaid, write or stamp here, "To be prepaid." — Received \$— to apply in prepayment of the charges on the property described hereon. — Agent or Cashier. Per —. (The signature here acknowledges only the amount prepaid.) Charges advanced, \$—.
—	—	—	—	—	
—	—	—	—	—	
—	—	—	—	—	
—	Sample copy.	—	In Eastern.	—	
—	—	—	—	—	
—	—	—	—	—	

S. A. WALLACE, *Grain Agent*

Per —.

Durant & Elmore Co., shipper, per G. T. G.

(This bill of lading is to be signed by the shipper and agent of the carrier issuing same.)

Mr. PATON. I would say that our proposed bill covers both of those classes.

Senator CUMMINS. Yours is the long bill?

Mr. PATON. The Stevens bill. The Pomerene bill also covers both classes. It covers not only the goods where the bills of lading are issued without goods, but covers cases where goods are delivered without taking up the order bill of lading, and makes the carrier responsible.

Now, while I am on my feet—and it will not take three minutes—and I beg pardon of the shippers—I have a case which occurred this week, and as to which I have a brief statement from the National Newark Banking Co. of Newark, N. J., referring to another case of the issue of bills of lading by a railroad in Florida—which has happened almost under the shadow of these hearings. I simply put this in evidence as being pertinent to meet the contention of the railroad companies that these cases are not frequent, and they are continually occurring. This statement is signed by the cashier of the National Newark Banking Co., and is as follows:

On February 13, 1912, at the request of L. N. Dentz & Co., of Newark, N. J., the Federal Trust Co., of that city, sent a telegram to the Bank of Fort Myers, Fla., as follows:

"Will honor draft, C. S. Crews, bill of lading attached, on L. N. Dentz & Co., \$325, if merchandise is consigned to them."

On February 26, 1912, the Union National Bank, of Newark, presented for payment at the Federal Trust Co. a draft in the usual form, signed by C. S. Crews, for \$325, drawn on L. N. Dentz & Co., which draft was paid and the amount remitted to the Bank of America, in New York City, for credit of the Bank of Fort Myers, Fort Myers, Fla.

There was attached to this draft a bill of lading, made out on Form No. 156 of the Atlantic Coast Line Railroad Co. in the usual standard bill of lading form, dated at Fort Myers, Fla., February 19, 1912, stating that there had been received from J. H. Maloy 320 boxes grapefruit, consigned to L. N. Dentz & Co., Newark, N. J., and contained in car F. G. E. No. 2304, which bill of lading was signed in indelible pencil by W. H. Phillips, agent.

The goods purporting to be covered by the above-described bill of lading not having been received in Newark in due course, the consignee asked the Pennsylvania Railroad Co. to trace the car, and they reported that they could find no record of such a shipment. The consignee then communicated with the agent of the Atlantic Coast Line Railroad Co., who stated to them that no such goods had been received and that car F. G. E. No. 2304 was nowhere near Fort Myers, Fla., on or about February 19, 1912.

Thereupon, on March 2, L. N. Dentz & Co. asked the Federal Trust Co. to communicate with the Bank of Fort Myers and ask them that payment be withheld. A reply was received, stating that the money had already been paid over, and on March 5, 1912, the cashier of the Bank of Fort Myers, Fort Myers, Fla., J. E. Foxworthy, wrote a letter to L. N. Dentz & Co. as follows:

"Replying to your letter of the 1st instant, I wish to say that there is something crooked in this matter; so crooked that we have taken steps to have Crews arrested and bound over to await the action of the grand jury, which meets next fall. He has not yet given bond, which is fixed at \$1,000, and is still in jail. We acted promptly in this matter, as we hoped to recover the money, but did not succeed in getting it back. The bill of lading was signed by the agent of the railroad company, but it appears that there was no fruit or car by that number forthcoming. It seems to me that the railroad company ought to be responsible for the amount advanced."

On March 7, 1912, he also wrote to the Federal Trust Co., of Newark, N. J., the following letter:

"Your letter of the 4th instant in reference to the Crews-Dentz matter is to hand.

"After we had paid the draft the railroad agent informed us that bill of lading had been obtained from them under fraudulent pretenses. We had Crews arrested and endeavored to recover the money we had paid out on the draft. He is now in jail under bond to await the action of the grand jury, which sits next fall. I understand he worked a similar game on the Bank of Winter Park and that they have a warrant for him also. I wrote Messrs. Dentz & Co. on the 5th a statement of the facts. We

trust that they will press this matter to the fullest extent and send the young man where he belongs."

I believe the above to be a full and accurate statement of the facts in this case.

NATIONAL NEWARK BANKING CO.
W. M. VAN DEUSEN, *Cashier*.

I simply desire to put those papers into the record as bearing upon the question of the issue of false bills of lading.

I thank you, gentlemen, for your courtesy.

There being no further questions, Mr. Paton was excused.

ADDITIONAL AMENDMENTS SUGGESTED TO SENATE BILL 957.

[References are to the copy of the bill with suggested amendment in italics presented by the American Bankers' Association.]

1. In line 4 of page 2, immediately after (c) insert the following: "Unless issued for shipment to a foreign country."

2. In the first line of page 3, after the word "shall," insert the following: "Except where bills of lading for shipment to a foreign country are issued in sets or parts."

3. Ninth line on page 4, at the end of section 4, add the following: "But the carrier when requested and given reasonable opportunity to examine and verify the contents of any car shall not insert in the bill of lading issued for the goods therein the words 'shippers' load and count' or other words of like purport."

4. At the end of section 6, strike out the words "such refusal" and add "refusal to deliver. Provided that in such case due notice be given by the carrier to the consignee or to the party who, according to the terms of the bill of lading, is to be notified of the arrival of the goods at their destination."

STATEMENT OF CHARLES ENGLAND, BALTIMORE, MD. (GRAIN BUSINESS).

Mr. ENGLAND. Mr. Chairman, and gentlemen, with others present here, I represent the Council of Grain Exchanges of North America; the council is composed of the following organizations:

Chicago Board of Trade, Kansas City Board of Trade, Toledo Produce Exchange, St. Louis Merchants' Exchange, Detroit Board of Trade, Duluth Board of Trade, Omaha Grain Exchange, Buffalo Corn Exchange, Baltimore Chamber of Commerce, Cairo Board of Trade, Philadelphia Commercial Exchange, Minneapolis Chamber of Commerce, Milwaukee Chamber of Commerce, New York Produce Exchange, Wichita Board of Trade, San Francisco Chamber of Commerce, Peoria Board of Trade, St. Joseph Board of Trade, Memphis Merchants' Exchange.

This association, composed of those business organizations, has since its inception, taken a deep interest in this bill of lading matter. Generally speaking all these organizations have of themselves at times made an effort for legislation safeguarding the bill of lading, and making it a better document. There has been a good deal of testimony submitted to this committee from the financial institutions, and one might suppose that they were more deeply interested in this matter than are the commercial interests. They are deeply interested in it, but should the bill of lading lose its integrity as a safe document, the banks would not be the chief sufferers. It would be the commercial interests.

It is in behalf of the buyers of these bills of lading, or the owners of the property, that these organizations ask you to give the bill of lading a proper protection. A man who ships his goods to the receiver at the end of the terminal, or interior market, that man at that terminal market makes advances on that bill of lading. In time he will

take his bills of lading to the bank and the bank advances him money on them, partly upon the belief that the bills of lading represent property and partly upon the faith of the merchant who is negotiating the loan, or asks for the loan. If anything should happen to the bill of lading and it should be proved to be not a good document the bank, of course, goes first to the merchant, and he must make good to the full extent of his capital, and for that reason these organizations are very deeply interested in the bill of lading, and respectfully ask this committee to propose such legislation as will throw every safeguard possible around it.

Now, gentlemen, there has been a great deal of testimony offered before you, and much that I could say would in a way be a repetition of what has already been submitted.

We do not want to take too much of your time, because there are others here, and I will say in conclusion that these organizations have petitioned, and do petition here, to give us a bill of lading that will be acceptable and safe under ordinary business conditions. We also respectfully submit that in legislating Congress should legislate fully in a matter of this kind, and for that reason these organizations, generally speaking, favor the Pomerene bill.

There being no further questions, Mr. England was thereupon excused.

STATEMENT OF HENRY GOEMANN, GRAIN MERCHANT, TOLEDO, OHIO.

Mr. GOEMANN. Mr. Chairman and gentlemen, I represent the Toledo Produce Exchange and also the Grain Dealers' National Association, with an affiliated and direct membership of approximately 2,000 dealers in 31 States and the District of Columbia. I will, with the permission of the committee, submit the list of States represented. It is as follows:

Grain Dealers' National Association, affiliated and direct membership, approximately 2,000, from the following States:

Michigan, Georgia, Kansas, New York, Maryland, West Virginia, Missouri, Indiana, Pennsylvania, Florida, Louisiana, New Jersey, Nebraska, Connecticut, Ohio, Iowa, Virginia, Arkansas, Wisconsin, Mississippi, Massachusetts, Illinois, South Carolina, Tennessee, Kentucky, Alabama, Indiana, Colorado, Minnesota, Texas, Oklahoma, and District of Columbia.

At a conference, after the previous hearing, the shipping people indorsed the Pomerene bill with a few amendments, which I would like to go into the record as meeting our view.

The CHAIRMAN. You can just leave them with the reporter.

Mr. GOEMANN. I will not read them unless you desire me to, but will submit them to the reporter.

The CHAIRMAN. You can state them briefly.

Mr. GOEMANN. I would suggest the following:

Strike out paragraph B of section 3.

Section 23, page 11, line 20, strike out the words "by the improper loading or" and then add to this section, on line 22:

Provided, That if the carrier verifies the shipper's statement of property so loaded, or refuses so to do upon demand of shipper, the carrier shall not insert the words "shipper's load and count," or words of like purport in such bill of lading.

That is the only change that we would like to have made in the Pomerene bill. We believe that that bill meets the requirements thoroughly. It has been adopted by nine States, practically, and very likely in the uniform adoption by the States will finally become a bill of all the States, so that it will cover both intrastate shipments as well as interstate shipments.

At the previous hearing, the counsel of the railroads spoke of the necessity for protecting the cotton bills of lading when they go to Europe; he said that cotton was cash. Well, grain is cash to the same extent. We raise in this country approximately 5,000,000,000 of bushels of grain a year, a great proportion of which goes from one State to another, and is covered by order bills of lading, and shipped by men of small means who are compelled to take these bills of lading to their banks in order to keep on buying from the farmers, and we, as grain merchants in the centers, consider these bills of lading carry with them the negotiable feature, and that they will deliver to us the property they call for. Therefore the same argument that holds good for the cotton men will hold good for the grain trade of this country. We must have a bill of lading that is absolutely safe—delivering to us the property that that bill of lading covers.

Now the Southern Railroad gives to the cotton shipper—when it goes to Europe—the protection in his bill of lading without extra charge, whereby they certify the genuineness of this bill of lading; but when it comes to the domestic consumer of this country they are unwilling to go to that extent, and they make us suffer.

Now I do not see why they should discriminate. If they can arrange to protect the cotton shipments to Europe, they certainly can arrange to protect shipments, whether cotton or grain, to the domestic consumers of this country, and we are entitled to it.

The learned counsel for the railroads the other day stated that crime would be bred all over this country, that everybody would get at the big railroads and issue fraudulent bills of lading on account of this law, and they would lose enormous sums of money. I do not believe that. But supposing they were the targets for these bills of lading. I am willing to go on record that if after a year's trial of a law, as outlined by the Pomerene bill, they can show to the Interstate Commerce Commission that they have lost enormous sums of money through this law, I am willing to say for the shippers that I represent that we are always willing to be fair, and any just rate that the Interstate Commerce Commission may decide the railroad companies are entitled to under such law, we are willing to abide by; but we do not want to say that they shall have the privilege of collecting an excessive rate unwarranted by the facts. Now, if they will give the facts to this impartial body Congress has established for this purpose and show them that they will lose this money, we will agree to any reasonable rate.

It would be unwise probably to enact in this law a guaranteed rate for a guaranteed bill of lading. In other words, it would put into effect two sets of bills of lading. What would be the result? You would have the present bill of lading which you are using and you would have a new guaranteed bill of lading at the high rate. Suppose that rate increase would be arbitrary, say 5 per cent only—although the parties have talked in previous meetings, in conferences that were had between shippers and railroads when we agreed upon this uniform

bill of lading, that the rate might be 20 per cent increase. Now, the average rate on grain is 20 cents a hundred, and add 5 per cent—add a cent a hundred, which is prohibitory in the grain business, because it is handled on a very close margin—the result would be that the small country shipper who needs protection on the order bill of lading more than the large shipper, his banker would say to him, “You have got to ship these goods under that guaranty bill of lading or I will not discount this bill of lading at the bank for you.” He has got to pay a cent a hundred more. Now, he can not compete with a very large firm whose credit at the bank is unlimited, and the bank would take those old bills of lading on the standing and the indorsement of the firm who made the deposits for those bills of lading attached to drafts. You can readily see the discrimination it would cause in a short time. It would drive out of business the smaller shippers with limited capital. For that reason I am opposed to this law containing any clause that will involve a mandatory order for the railroad companies to charge a higher rate without first leaving it to the commission to decide whether such rate will be proper and right.

They further state in their testimony that every shipper knows that these railroad agents are not responsible for these bills of lading. I wish to say that in my experience of 35 years in shipping grain and going out in the country and mingling from one end of this country to the other, I have never yet met a man who did not believe that that bill of lading was as good as gold, and for all that was back of it, and that every agent had the authority to sign that bill of lading.

Now, according to the testimony given heretofore, that does not seem to be the fact, but that very few agents are authorized to sign order bills of lading, and it is therefore of some importance that we should have this law so that we should know absolutely that every agent in their employ has the right to sign these bills of lading that come to us. In this way we have no protection whatever.

I do not know that I ought to take up the subject any further. I could keep on talking for an hour, probably, and tell you about different things from a practical standpoint, but it seems to me that these few points are the leading ones that we are asking for, that we be protected in the bills of lading at a fair rate, and we are willing to leave it to the Interstate Commerce Commission as to what shall be the just compensation.

Senator CLARKE. In your 35 years of experience in the grain business have you ever gotten hold of a bill of lading that had been issued by an agent where the grain had not been delivered to the carrier?

Mr. GOEMANN. No, sir; my only difference with the railroad company has been that they delivered the property without surrender of the bill of lading, and then they paid me for it because their agreement was to pay for it. My dealings are largely with the country agents. That only certifies further the honesty of the country agents.

Senator CLARKE. Do not most of your troubles grow out of the fact that they reserve in the bill of lading the privilege of milling the product in transit?

Mr. GOEMANN. The trouble is mostly at the transit points. In handling grain we are obliged to have transit points—I mean, to operate at a transit point on the Pennsylvania Railroad.

Senator CLARKE. Has it not also become a custom that confidence grows up between the banks and the railroad people and the grain

dealers by which they take no real notice of the fact as to whether the shipment of grain is covered by an outstanding bill of lading?

Mr. GOEMANN. The roads are getting more particular on that point.

Senator CLARKE. Is it not a fact that bankers are pretty generally aware of the fact that the consignee is not observing altogether the identity of the particular shipments of grain and the particular bill of lading which they have in hand, but allow him to ship in and ship out indiscriminately, relying upon the fact that he would have as much grain in the mill at one time as the bill of lading that they hold calls for?

Mr. GOEMANN. It is the only way, practically, that business can be operated.

Senator CLARKE. But it is altogether done in opposition to the will and wishes of the local banker who holds the bill of lading?

Mr. GOEMANN. He understands that the tonnage is covered by the bills of lading.

Senator CLARKE. But it is not the identical tonnage covered by the bill?

Mr. GOEMANN. Not the identical tonnage, but the total tonnage covers the same grain.

Senator CLARKE. That is the difficulty that I have found in our country.

Mr. GOEMANN. Mr. James has suggested that I go a little further in explaining the milling in transit proposition. Of course grain elevators at these terminal points take this grain during its big movement from the farms right after harvest, when the farmers sell it from the field, and therefore they are compelled to accumulate at these terminal markets a vast amount of grain and reforward it. Our storage is done in large tanks or bins that will hold anywhere from 25 to 50 cars at a time, and that grain is held in storage, dumped into one of these large bins, and reforwarded after it has been cleaned, mixed, or dried or any of the commercial uses necessary to cover the handling of the grain in transit.

If a banker has as collateral bills of lading for 25 cars of corn, these 25 cars are in one of these bins, and while the identity of each car is not protected the kind of grain represented on that bill of lading is there.

Senator CLARKE. The bills of lading identify the corn on which the actual advancement was made by giving a description of the car in which it was shipped, the point from which it was shipped, and the destination, so that the lien the banker has by the acquisition of the bills of lading is on that specific property and no other property?

Mr. GOEMANN. Which may be in bin or tank 1 or 5.

Senator CLARKE. If that specific grain has been milled out, there is sufficient grain in that bin to take care of that particular description?

Mr. GOEMANN. Yes, sir.

Senator CLARKE. That is it?

Mr. GOEMANN. Yes, sir. Mr. James thinks that you have the idea that it is only milling in transit. It is grain also in transit. We forward grain without milling it.

Senator CLARKE. If the railroad company declines to deliver to the elevator or to the mill that particular grain until you surrendered that particular bill of lading, that would protect themselves?

MR. GOEMANN. In the majority of cases they have surrendered them when it comes there. The bankers hold them from the time it is in transit, and when the grain reaches this point, then the bill of lading is taken up from the bank and the warehouse receipt too.

Senator CLARKE. In every case?

MR. GOEMANN. In the majority of cases. Of course, I can not tell what the custom is at each and every point; but in the majority of cases the careful railroads will have the bills of lading surrendered before they deliver the property, and then when it comes out they issue a new bill of lading showing it is in transit.

Senator CLARKE. Is not that care that you have just described the exception and not the one that conforms to the usual rule?

MR. GOEMANN. I would not like to say that. But in my own case I surrender it all. I would not want to go on record, because I might make a statement that I might not be able to confirm. But there would be a chance where the railroad company was careless through its agents to have occur what I suggest. Of course, the opportunity is there.

Senator LIPPITT. I understood you to say that in your 35 years' experience you yourself have never suffered loss from the trouble which this bill is proposed to cure.

MR. GOEMANN. No, sir; I have not, not on inbound shipments. But we have on outbound shipments where the agent has delivered my property without the surrender of the bill of lading, and in that case we have filed claim against the railroad.

Senator LIPPITT. These railroads have always protected you in the past?

MR. GOEMANN. Yes, sir.

Senator LIPPITT. So that in your experience you have never suffered a loss of any kind through the present situation?

MR. GOEMANN. No, sir.

Senator LIPPITT. Is there much loss suffered from the present situation?

MR. GOEMANN. Taking the enormous volume of tonnage that is carried and the enormous amount of money involved, it is very small. And that is why I am objecting to any arbitrary rate or two sets of rates made by law, because of the volume of loss compared to the money involved, which is very small. Of course, when they do occur they hurt you so bad that we want to be protected. In the one or two cases where the banks get hurt they draw down on everybody, and everybody suffers. That is the difficulty. It is not the enormous sum so much that the bank suffers, but when they do suffer they draw down on everybody, and we all have to suffer, because our accommodations are curtailed, and we must have the freest interchange in the discounting of our drafts and bills of lading, because we have to do so much of our business that way.

Senator LIPPITT. Has there been any change in the recent practice on the part of the railroads that has aggravated this trouble?

MR. GOEMANN. This Delaware & Hudson Railroad case has been the most recent one and the most severe in the grain line that I have any recollection of. That was at a transit point.

Senator LIPPITT. Did that case occasion the introduction of this bill?

Mr. GOEMANN. I do not think so. The shippers have been asking for a bill of lading for the last 20 years, and we got together—the bankers and the railroads and the shippers—and this order bill of lading that is now in effect is the result of that. There was a compromise. We could not force anything. We asked the Interstate Commerce Commission to indorse it and requested the railroads to put it in use. At that time the Interstate Commerce Commission had no power over bills of lading, but I understand they have since acquired the power over bills of lading, under the Carmack amendment. If this goes through it will meet the requirements of the bankers and the shipping public generally.

Senator LIPPITT. That is all.

The CHAIRMAN. That will be all.

There being no further questions, the witness was thereupon excused.

**STATEMENT OF J. W. WARNER, REPRESENTING THE NEW YORK
PRODUCE EXCHANGE, NEW YORK CITY, N. Y.**

The CHAIRMAN. State your name, residence, and occupation, for the purpose of the record.

Mr. WARNER. My name is J. W. Warner, of New York. I am a grain receiver and exporter, representing the New York Produce Exchange.

For fear that you may not realize what an important concern we have, I will simply state that we are incorporated under the laws of the State of New York, a body of business men of about 2,100 members, and our business consists chiefly in dealing in grain, flour, and provisions, and some other products of the soil, raw and manufactured. We are, of course, continually buying and selling these products, receiving and shipping and merchandising them, the title of which goes from one to the other, from buyer to seller, through the warehouse receipts or bills of lading. I mention that to show that we are interested, because there seems to have gone out from this hearing an impression—or the impression has been deliberately created—that this is a bankers' measure; that nobody else is particularly interested except bankers.

I am of that class generally known as receivers and exporters. We are at the jumping-off place.

The bills of lading that are issued in the West come through a great many banks and perhaps a number of parties; when they come to us, the last holder, presumably we have paid the drafts attached and we own that bill of lading. If it turns out to be spurious, we are the only one who suffers. If we use those bills of lading subsequently to get loans from the bank, the bank does not stand to lose 1 cent as long as the parties to whom they have loaned remain solvent. So I say that the grain receivers at the seaboard are as interested in this bill, if not more so, than any other class.

There is absolutely nothing that the organization can do to add validity to this bill of lading. It has been stated that the bankers at the initial point might, if they would, do something to verify the bills of lading before they accept them. So far as my own belief is concerned, I believe that is impracticable. But they should answer that

query. They seem to be pretty able to take care of themselves here. So far as the receivers at the seaboard are concerned we have absolutely no opportunity to verify those bills of lading.

Generally the first information we have that a rail shipment has been made against any of the purchases we have made in the West is when the bill of lading is handed into our office and payment demanded against draft attached, or else it goes to protest. We have no opportunity to verify it, and there is no place to which we could go if we had a reasonable opportunity. Of course it takes anywhere from a week to 10 days to verify a bill of lading and that is absolutely useless.

If we do, as we sometimes do, take a bill of lading down to the carrier that brings that grain—I am speaking of grain particularly now—if we take it down to the office, the clerk to whom we apply generally turns white, his knees go together, and he stutters and stammers something that is neither illuminating nor convincing. The best he will do is to make an inquiry, and that takes from two days to three weeks. It often happens by the time that we get an answer, the car about which the inquiry was made is in the delivery yard. In the meantime, if we accept any of those bills of lading we are resting under the feeling all the time that we may have something on our hands that is no good.

All our resources are sometimes absolutely invested in those bills of lading. Sometimes more than all our resources are invested, because sometimes if business is running good we borrow from the banks, or other people who have money to lend on these bills of lading. So I do not see how anybody could be more interested than the receivers of this grain and grain products.

It has been stated here, I think, by Senator Faulkner, as I read over the testimony of the last hearing, that the class of employees of the railroad companies are as intelligent and of as high a character as any of those employed by large concerns in a clerical capacity. I am willing to take that statement.

I do not believe the railroad companies are assuming any considerable risk at all in agreeing to this bill if they would do as they did in the case of cotton. If they will notify their agents in a way that they will know that it was just what they meant, that they should issue no bills of lading until the goods had actually been received and in the physical possession of the road, I do not believe that those employees would sign bills of lading after having received those instructions. I do not think the character or the honesty of an employee is measured by the salary he gets, because as a matter of fact it is testified here in these hearings by those who know more about it than I do that all the trouble on account of these fraudulent bills of lading have taken place at the larger shipping points and have taken place by agents who have been trying to get business. I dare say that these small agents are continually nagged by their superiors to get more business, and they get the feeling from this continual nagging that the idea of their superior is that they must get business—get it honestly if they can, but get it. And so when they know that the railroad company is not responsible for the issuance of these fraudulent bills of lading—perhaps they are not fraudulent, because perhaps they are issued in good faith—they go out and issue those bills of lading with the expectation that the shipper with the money he gets from the bank on those bills of lading will go out

and buy the stuff and make good the bills of lading. But I believe that if these instructions were given in good faith, these employees, who are just as honest as any other similar class of employees in any other business, would not issue those bills of lading.

So, on behalf of the New York Produce Exchange and of the grain interests generally, I urge the committee here to recommend some legislation that will make these bills of lading good, just what they purport to be, so that we can carry on the business in a fairly safe way, which we can not now do.

Just a word more. Many references have been made all through these hearings to these frauds at Albany. We have with us to-day from New York a man who is a victim of those fraudulent issues of bills of lading. He has brought some of the bills of lading down here. They are all of one kind. They are absolutely regular, so far as anything on the face of them is concerned, and if you will allow I should like to have him appear.

The CHAIRMAN. We will hear him later.

There being no further questions, Mr. Warner was thereupon excused.

STATEMENT OF HUGH E. WHITE, SECRETARY OF THE MINNEAPOLIS TRAFFIC ASSOCIATION, OF MINNEAPOLIS, MINN.

The CHAIRMAN. Mr. White, just state your name, residence, and business for the purpose of the record.

Mr. WHITE. My name is Hugh E. White, secretary of the Minneapolis Traffic Association, of Minneapolis, Minn.

Mr. Chairman and gentlemen of the committee, I only desire to say a word generally on behalf of the membership of the Minneapolis Traffic Association and the St. Paul Association of Commerce. Our ideas are represented in the Pomerene bill. I have not given any consideration to the amendments which have been referred to or proposed, rather, by the gentleman who spoke a few minutes ago, but in the main, our ideas, as I say are presented in the Pomerene bill, and we will be very well satisfied with legislation along that line.

That is all I care to say.

There being no further questions, Mr. White was thereupon excused.

The CHAIRMAN. I will ask the audience to retire, as we desire to sit in executive session for a few moments.

Thereupon at 12.35 o'clock p. m., the committee went into executive session, after which at 12.45 p. m. the committee took a recess until 2 o'clock p. m.

AFTER RECESS.

The committee reassembled at 2 o'clock p. m.

The CHAIRMAN. Mr. Magnuson, we will be glad to hear you.

STATEMENT OF C. A. MAGNUSON, A GRAIN ELEVATOR OPERATOR, OF MINNEAPOLIS, MINN.

The CHAIRMAN. Give the reporter your name, business, and residence for the record.

Mr. MAGNUSON. My name is C. A. Magnuson, of Minneapolis, Minn., and my business is operating grain elevators—shipping and receiving.

Mr. Chairman and gentlemen of the committee, I appear here before your honorable body individually as a receiver and shipper of grain and grain products and seeds; as manager of a line of country elevators and a terminal elevator doing business through the Chamber of Commerce of Minneapolis, Minn., and in the States of Minnesota, North and South Dakota; also by appointment representing the Chamber of Commerce of Minneapolis, Minn., with its varied receiving and shipping interests, through not only the three States mentioned above, but all other States tributary and shipping to and receiving grain from Minneapolis; also as a member of the Duluth Board of Trade, and as a member of the National Grain Dealers' Association.

In relation to the uniform bill of lading, I wish to say first, that there have been some things brought out here in relation to whether or not any losses have been suffered by reason of the present bills of lading. Losses have been suffered by our own company and also by other companies in the direction of settlements which we have been forced to make with carriers on account of a pretended contract which now appears on the back of the bills of lading, and which a shipper signs practically under duress; first, by reason of not acknowledging on the part of the railroads the amount of grain put into the cars by shippers, and also by reason of the stipulation on the back of bills of lading that the basis of settlement in case of the destruction of property should be on the date of the issue of the bill of lading.

The CHAIRMAN. The price of the goods on the date of the bill of lading?

Mr. MAGNUSON. The price of the goods on the date of the bill of lading. The method of that settlement is wrong for the reason that the shipper has only opportunity to buy his grain back when he is notified that it is destroyed. As an illustration I will say that if a shipper shipped a thousand bushels of flax on the 2d day of January from a point in North Dakota to Duluth, Minn., which was on the 2d day of January worth \$2 per bushel in Duluth, and the shipper would be notified by the carrier that the flax was destroyed on the 20th of January. On the 20th of January the price of flax was \$2.50 per bushel in Duluth. In order to preserve or deliver if sold his property the shipper would have to buy 1,000 bushels of flax in Duluth at \$2.50 per bushel, and he would present a claim against the railroad company for \$2.50 per bushel, the measure of his damages. The railroad company, by reason of an implied contract on the back of their bills of lading, would only pay \$2 per bushel, so that he would be out on that shipment \$500.

The bill of lading should be so constructed that the measure of damages which the carrier should pay should be the measure of damages sustained by the shipper, and that would not be to the disadvantage of the railroad company, because in a general average of the claims presented the road would have as many times, perhaps, when the price would be less at the time of the destruction of the property as times when it would be more. The individual shipper might not have but one loss in a lifetime; he might not have more than one car destroyed in his lifetime, and if he sustained a loss on that he would have no way of averaging it up.

The question would naturally arise as to why a carrier should wish to have the time of settlement fixed as to price on the date of the bill of lading rather than at the time when the shipper or consignee has notice of the destruction of the property; and, as an illustration, would say that, on the date of shipment of a carload of flax, the price would be \$2 on the date of the bill of lading. At the time of the destruction of this car of a thousand bushels of flax, the price would be \$1.50 per bushel. The only interest the shipper would have would be to buy back 100,000 bushels destroyed for him by the carrier. If he only paid \$1.50, not knowing the law and that being his loss, it would be natural for him to make his claim for \$1.50 per bushel or \$1,500, and the carrier would pay him \$1,500. He would be satisfied and the carrier would have paid him \$500, less than he was actually entitled to by reason of the contract to pay the price on the date of the bill of lading. Whereas, on the other hand, if the price at the time of the destruction of the property was \$2.50 per bushel, if the shipper made claim for \$2,500, the carrier would then fall back on the fact that, at the time of the date of the bill of lading, the flax was only worth \$2 per bushel.

Now, in regard to the carriers being responsible for bills of lading, I would say that in Minnesota and the Northwest we have a law whereby if a grain agent issues a grain receipt for grain before it has been delivered into his elevator, he is criminally liable—subject to a term in the State prison for the offense. If a cashier of a bank issues a certificate of deposit without receiving the money, he is also criminally liable.

Why should not the carrier exercise the same care, be under the same restraint to not issue a bill of lading previous to the receipt of the goods, and under the same conditions?

In relation to the present bills of lading prepared and submitted to this committee, the elimination of and the addenda thereto has been stated by a previous speaker, so that it is not necessary to refer to it again; and I agree perfectly with the elimination and the addenda offered.

Further, I would wish to call the attention of your committee to section 27, page 13, of the Pomerene bill, No. 4713, which I think should be very carefully studied by the committee. The argument for the elimination of section 27 on page 13, lines 1, 2, 3, 4, 5, 6, and 7, is that a carrier may undertake the transportation of a car of goods under that section from one point to another interstate, and the delays in transportation which might injure those goods to an extent that the consignee on reaching its designation would refuse to receive them. Under section 27 it appears that if the consignee did refuse to receive the goods, the consignor being far distant, after a time, and the time might be short, the carrier could appropriate those goods and sell them, and the carrier would not be held liable for anything except the residue that might be left, after the charges for freight and storage, etc., had been taken by the carrier.

It would seem as though the carrier in this case should have the responsibility thrust upon him because of the delay in transportation, or at any rate the shipper should be protected in cases of this kind.

My principal object in coming down here is to add my mite in the way of asking this committee to eliminate from any bill of lading any possible contract between the shipper and the railroad company that

would minimize or remove the common-law liability of the carrier to the shipper or the consignee.

That is all. I thank you, Mr. Chairman.

There being no further questions, the witness was thereupon excused.

The CHAIRMAN. Who is the next gentleman to be heard?

STATEMENT OF EDWARD D. PAGE, MERCHANT, 78 WORTH STREET, NEW YORK CITY, N. Y., REPRESENTING THE MERCHANTS' ASSOCIATION OF NEW YORK.

Mr. PAGE. My name is Edward D. Page, 78 Worth Street, New York. I am a merchant, and I am appearing here representing the Merchants' Association of New York.

The Merchants' Association of New York is composed of both shippers and receivers, having about 1,800 resident members and about 25,000 nonresident members. The committee on commercial law, of which I am chairman, is composed of representative merchants from the wholesale and retail dry goods, cotton and woolen manufacturing, tobacco, butter and eggs, wholesale groceries, clothing, boots and shoes, export grain, produce, cotton and banking trades. Its committee meetings are generally well attended, and there is brought to bear upon any subject the combined experience of these trades through a wide range of transactions. This committee has given a study of over four years to the bill of lading question.

The present bills under consideration represent an effort to make the receipt issued by the railroad company and signed by its agent conclusive evidence that the property named therein is in existence and has been accepted by the railroad company under a contract for transportation elsewhere. The reason for these bills is to make the bill of lading a better security or collateral against drafts which are cashed by the banks, in order to facilitate the financing of merchandise in its movement from producer to consumer.

That these bills should introduce this principle which is not consistent with previous law, previous decisions, and previous customs, is due to the fact of the enormous changes in the methods of doing business which have come about in the last 25 or 30 years.

I can hardly add anything to the very admirable statement of Senator Clarke relative to the reason why the law should be changed. Both business and transportation have grown beyond the stage where principles of law which were adequate enough under a simpler condition, can no longer be applied without detriment to the welfare of the whole community under the more complex conditions that prevail to-day.

The divorce of the carrying of merchandise and the carrying of mails and passengers which has come about since the introduction of the railways has brought about a condition of affairs where the documents representing the title to merchandise travel at a much faster rate than the merchandise itself. The number and amount of transactions which are involved in the moving of our great crops has made it impossible for local credit any longer to finance the moving of those crops. They are therefore financed by drafts representing the value of the merchandise attached to bills of lading representing the physical possession of the merchandise. The carrier no longer travels

with his merchandise. He acts through agents and acts over a large territory instead of over a small one. The consequence is that the rules of law which applied to such bills or receipts for merchandise in the days when the merchants went along with the goods have been entirely outgrown, and it needs new legislation in order to adjust the present conditions to the needs of society.

The two bills that are before your committee have been studied by the Merchants' Association, and they have to say with reference to Senate bill 957, in the shape in which it was introduced, that the only suggestion they would make would be that in section 6 a proviso should be added:

That in any such case—

That is to say, in the case of property being replevied or removed from the possession of the carrier—

That in any such case due notice be given by the carrier to the consignee or to the party who, according to the terms of the bill of lading, is to be notified of the arrival of the goods at destination.

This would seem to be a simple measure of justice in providing that all parties to the transaction should be notified of its breach.

Since the introduction of this bill a series of amendments have been drafted, or rather suggested amendments, extending the purview of the bill to foreign commerce as well as to domestic commerce. This brings about a very different application, an application to customs of trade and laws of merchants entirely different from those prevalent in this country. It seems impossible properly to conduct an export business without bills of lading drawn in sets. Generally speaking, a set of bills consists of three bills, all of them of equal validity, all of them representing the merchandise for purpose of collateral and upon the surrender of any one of which the merchandise may be claimed by the consignee. That custom originates in the perils of the sea. It would not be safe for a merchant invoicing goods abroad to rely simply upon a draft and a bill of lading sent by mail in the same steamer in which the goods are carried. The vessel might be lost, and in that instance all trace would be lost of the draft transaction, involving money, and of the merchandise transaction evidenced by the bill of lading. It is therefore customary for bankers' drafts, or rather for bills of exchange and bills of lading to be drawn in sets.

Of a set of three drafts, the first draft presented is the one which is accepted, and it then immediately destroys the validity of the other two drafts. It is necessary to have three bills of lading, therefore, on each of which is stated that the bill is drawn in a set of three and that one being executed the others are void. That would be prohibited by this bill with the proposed amendments drafted by the conference between the counsel of the bankers and the counsel of the railroad companies.

The CHAIRMAN. Will you pardon an interruption there?

Mr. PAGE. Certainly.

The CHAIRMAN. What is the practice now with reference to the drawing of three bills of exchange and three bills of lading under the existing conditions—is that done?

Mr. PAGE. That is done; yes, sir. Oftentimes as many as 10 bills of lading are drawn for a variety of purposes, and all of them are

delivered to the banker. But some of those are required by custom-house practice. I am not able to say whether in every instance in the large and varied practice that we have in New York it can be possible to mark all but three of those bills duplicate. But the practice works well and is regulated—not by an American custom, but by the custom of the port to which the merchandise is destined.

The CHAIRMAN. I had supposed you used three. I simply wanted to get it into the record.

Mr. PAGE. Generally three, although it depends somewhat on the market. Therefore certain amendments have been drafted which I shall leave to Mr. Williston to present covering this point, and which seem adequately to cover the question of foreign bills of lading which should be excepted from some of the provisions here relating to domestic bills of lading which are entirely proper.

In this connection I will file with the committee a letter from Messrs. Goldman, Sachs & Co., members of our association, relative to this matter, and ask that it go into the record.

The CHAIRMAN. It will be inserted in the record.

(The letter referred to is as follows:)

GOLDMAN, SACHS & Co.,
New York, February 29, 1912.

Mr. E. D. PAGE,
The Shoreham, Washington, D. C.

DEAR SIR: Referring to the conversation which you had to-day with our Mr. Harry Sachs, we beg to say that the steamship companies are in the habit of issuing in the ordinary course of business two bills of lading (original and duplicate), upon production of either of which delivery of the respective merchandise can be obtained. The full set of documents is then handed over to the bankers, together with the draft, and forwarded by them to their correspondents on the other side. To guard against loss in interest which may occur either through a breakdown of the steamer or a loss of the letter in the mails, the bankers here take the precaution of separating the papers received by them, forwarding the original draft, together with original bill of lading, insurance certificate, etc., by one steamer and the duplicate draft as well as the relative duplicate papers by a subsequent mail. Whichever set reaches destination first is presented to the drawee and duly honored by him, the outstanding set of documents being surrendered to him upon arrival. Since the railroad companies here have inaugurated the practice of validating bills of lading, only one original bill of lading is issued to the shipper in the interior, although he may obtain as many nonnegotiable copies as he wishes upon demand. In our experience, two bills of lading (original and nonnegotiable copy) is the rule, although in the case of shipments to South American countries Australia, the Far Eastern ports, etc., the steamship lines at times issue as many as for or more negotiable copies for each consignment, each one of these instruments being valid for the purpose of obtaining possession of the property. For your information we quote from a bill of lading before us the concluding paragraph, as follows: "In witness whereof, the master or agent of the said steamship hath affirmed to original and duplicate bills of lading, both of this tenor and date, one of which being accomplished, the other to stand void."

Trusting that this information will meet your requirements, we remain, with kindest regards,

Very truly, yours,

GOLDMAN, SACHS & Co.

Mr. PAGE. Thus far I have confined my remarks to Senate bill 957, which, with these very proper amendments, is indorsed by the Merchants' Association of New York.

When it comes to the matter of Senate bill 4713, known as the Pomerene bill, our association finds two grounds on which it will be compelled to oppose this bill. The first ground is that of its doubtful constitutionality. There is nothing so bad for business as legal uncertainty. And a bill which will have to be thrashed out in court, a

process involving perhaps three or four years, during all of which time it will be impossible for merchants and bankers to know whether they are acting within the law or whether they are breaking the law, would be regarded by us as a calamity. Otherwise the Pomerene bill, drafted for State purposes exclusively, is a bill which, with the exception of one provision, the Merchants' Association has always upheld. We believe that, with the exception of the definition of "value" contained in that bill, the bill is a good one. Our objections to the definition of "value" are briefly these: The merchants of New York and of the East generally and of the larger cities in the West are engaged in the granting of very large credit to their customers in other parts of the country. The granting of those credits has enabled merchants in the smaller and distant cities and towns to build up a business which upon their own capital alone they never could have accomplished. Those credits, extending from 30 days to 9 months, are valuable assets of the enterprising dealers in merchandise all over the United States.

The city of New York extends annually not less than \$10,000,000,000 of such credit every year. The city of New York, as you know, does probably 60 per cent of the business of the country, as indicated by bank clearings. It is, therefore, the most important factor of any city in the United States in the granting of credit. Anything that would tend in the least to destroy confidence in the validity of these credits would be a misfortune, not only to the city of New York, but to the whole country. Anything that would impede the granting of credit would be a similar misfortune.

There are at all times outstanding due New York not less than \$3,000,000,000 of credit formed by the sale of merchandise on time. The seller relies upon his merchandise in the last analysis to pay his bills. For instance, if a country merchant has \$10,000 capital and a merchant in New York sells him \$5,000 of merchandise, accepting a book account for that \$5,000 of merchandise, he depends upon the same surplus or assets existing after the sale as before. The sale, in other words, adds \$5,000 worth of merchandise to his customer's assets at the same time that it adds \$5,000 of liabilities to his customer's liabilities. It even adds more than \$5,000 of assets, because the merchandise can be sold at a profit.

All credit that is extended on time for merchandise is based on this consideration, that the merchandise will be sold for a valid consideration when it is sold; it will be sold for present consideration; it will be sold for money or the equivalent of money, or valid credits which are the equivalent of money.

The definition of "value" proposed by this bill is this:

"Value" is any consideration sufficient to support a simple contract. An antecedent or preexisting obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor.

This definition of "value" disturbs that balance of assets and liabilities upon which the merchant depends for the payment of his accounts. It makes it possible for a purchaser of merchandise to transfer the bill of lading not for cash, not for a valid book account, but for a promise to pay, a debt discharged by bankruptcy, a debt contracted by a minor, a debt barred by the statute of limitations, a promise to perform a trust, an agreement to abide by an award of arbitration, a promise to marry, a promise to give a sum to a third

person, a promise to abstain from business in a certain locality, a promise not to sue, an extension of time—all of those things which do not add to the assets of the merchant, but deplete his assets, imperil the credit which has been extended by the creditor. Worse than that. The words “an antecedent or preexisting obligation, whether for money or not, constitutes value,” are equally capable of indefinite extension. That would enable a man to part with the possession of his merchandise through the means of a bill of lading, for a note due after death, for a moral obligation, for a promise to abide by an arbitration, for a promise to pay a mistress, for a promise to indemnify, for a promise to support.

All of those are justified by cases which will be found in a brief which I wish here to file with the committee, with its permission, covering these points. I will put it in, and simply state that in the matter of the sales act and of the bill of lading act, as passed by the Legislature of New York, this definition was stricken out before the bills were enacted, as the legislature believed that it was not for the public welfare.

That is all I care to say, Mr. Chairman.
(The brief referred to is as follows:)

IN THE MATTER OF SENATE BILL NO. 4713, SIXTY-SECOND CONGRESS, SECOND SESSION.

The Merchants' Association of New York must earnestly protest against the enactment of the proposed definition of value contained in section 53 of the above bill entitled “A bill relating to bills of lading, etc.”

In this section it is stated that “‘Value’ is any consideration sufficient to support a simple contract. An antecedent or preexisting obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor.”

This definition is revolutionary, in that it omits all considerations of adequacy and of the contemporaneous or present character of the consideration. It substitutes a purely theoretical idea of value for the practical which has been developed by the law of English-speaking countries. It makes the definition of value identical with that of consideration.

Consideration is the most easily established element in our law. It includes any executory promise which is not illegal.

The phrase: “Any consideration sufficient to support a single contract” includes the verbal or written promise of another, provided only that it be not to do a thing forbidden by public policy or the criminal law. It is also in case of a unilateral contract includes any act subject to the same qualifications.

It may be a promise to pay a debt discharged by bankruptcy; a debt contracted when a minor; a debt barred by the statute of limitations; a promise to perform a trust; an agreement to abide by the award in an arbitration; a promise to marry; a promise to give a sum to a third person; a promise to abstain from business in a certain locality for a specified time; a promise not to sue; an extension of time; an agreement to indemnify against loss on some future contingency; a promissory note payable one day after death.

The possibilities are infinite under this phrasing.

The words “An antecedent or preexisting obligation, whether for money or not, constitutes value” are equally capable of indefinite extension.

The world include a long outlawed debt; an unliquidated claim of damages by reason of negligence; a duty to pay alimony; a duty to support an aged parent, children, or wife.

An obligation not for money might include a promise to remain in some employment for a fixed period or for life; to purchase goods of a particular dealer or of a particular kind; to remain a member of an association; to obey the rules of an association or laws of a State.

In one form or the other this definition includes every form of human activity by way of promise or act not forbidden by law. The promise may have been made far in the past or may mature far in the future or after the promisor's death. The obligation may be totally unrelated to commerce and exchange.

It is fiat value, not value as gradually developed by the law upon a basis of adequacy and contemporaneous exchange through many centuries, which these acts import.

THE PRACTICAL APPLICATION OF THIS DEFINITION.

To embody this definition in our law would be to forge a weapon to be used by the dishonest against their creditors which would have most unfortunate and widespread results. This definition of value is the pivot upon which will turn the important line of cases in which bona fide creditors attack fraudulent transfers made by dishonest debtors, and the courts will have to determine upon this definition whether the transferee of the dishonest debtor is or is not a holder for value.

If property may be readily and safely transferred by the dishonest trader, for the constructive and wholly theoretical value connoted by this definition, a new field for mercantile fraud will be afforded which may be cultivated in the strict compliance with the innovation thus created in our law.

The danger to be apprehended from this definition is not remote in a highly organized commercial community like the State of New York, where the credit system of doing business has its greatest extension.

The incorporation of this definition in our law would remove the creditors' most powerful weapon against fraud. Whatever success creditors have heretofore had in setting aside fraudulent transfers has rested on the inability of the transferer to prove that he received value and of the transferee that he gave value and in the inference of mala fides arising from the discrepancy.

The definition would tend to upset the entire practice by which merchants in New York State and other States have extended credit to their customers. Merchandise may be sold on credit for the purpose of resale with reasonable safety so long as the original seller can rely with certainty upon the laws which compel his purchaser to transfer that merchandise only for such value given contemporaneously as will approximately enable the purchaser to pay back his original debt. At present extenders of credit are reasonably sure that the purchaser from them will receive from the goods which they lend him approximate adequate value for the liquidation of his debt, or that they will have a legal remedy against the transferee who takes upon a constructive consideration or without adequate value.

In the absence of this assurance credits would have to be restricted and the volume of business would decrease. In New York State there are annual exchanges amounting in value to about one hundred thousand millions of dollars. Of this it is estimated that in the city of New York alone there are not less than twenty thousand millions annually of credit sales. There are probably outstanding credits at all times in the mercantile community of the State of from one thousand millions to five thousand millions or more. Only by this liberal use of credit are merchants able to do a business larger than their cash capital warrants. The consequences are a stimulation of the entire trade of the country and general business development.

This vast economic structure is dependent in large measure upon the seller's confidence in final liquidation of his account through resale of the merchandise by the purchaser to others who will pay for it adequate value.

If a definition of value be adopted by which inadequate and constructive consideration may be accepted for goods bought on credit, with the sanction of the law, the risk of extending credit is many times multiplied and the possibility of defrauding the primary seller many times increased.

It is impossible to foresee the extent and limit of economic change which might be worked by this definition. The change would be extensive and disastrous. It would be too heavy a penalty to inflict upon the merchants and business men of this State simply to gratify a desire to experiment with the law.

The omission of the definition would not impair the acts.

If the definition of value were left out of the acts there would be complete uniformity so far as the rules and customs in the various States obtain, except that value would be worked out by the courts of each State as business exigencies might require modifications of the present established rules, and the situation would in this respect be similar to that under the national bankruptcy act, where certain questions, such as the validity of transfers, what constitutes a preference, etc., are primarily dependent upon the existing law of the several States.

An experiment so full of danger should not be attempted when by the omission of this definition the harm might be avoided without impairing the object sought after by the commission on uniform state laws—that is, uniformity in dealing with sales and bills of lading.

ARGUMENTS ADVANCED IN SUPPORT OF THE DEFINITION OF VALUE.

It is claimed that this definition of value is desirable because found in the negotiable instruments act.

Bills of lading and documents of title represent actual commodities and chattels in existence upon the ownership and possession of which a trader's right to credit is in part based. A negotiable instrument is not based on specific chattels. It represents

nothing but a promise to pay and must be considered not as representing concrete values, but as representing general credit. In one case chattels are being transferred and in the other case nothing is being transferred except a right to receive money at a future time.

There is an historical distinction between negotiable instruments, mere orders for the payment of money, and transfers of actual goods and commodities, and the distinction is obvious in business to-day particularly from the point of view of the credit giver.

It is claimed by the Commissioners on Uniform State Laws that the definition should be inserted in the bills of lading act and in the sales act because it has appeared in the warehouse receipts act and vice versa. If attack is made on one act it is met by the definition in the others.

This argument of the commissioners amounts to an attempt to raise themselves by their bootstraps. They say that the definition is desirable because they have previously and in another place said it was desirable.

It is said that the supposed cases will rarely arise in actual practice. This possibility of fraud may indeed be remote in the library of an educational institution or in an agricultural State where transactions are few in number and simple in character and credit extension is limited, but this remoteness disappears as the transactions multiply and the danger is real and imminent in a busy trading center. Many of the suggested instances have actually arisen and come to the courts for decision. Business men are well able to pass upon this point, because they are in touch with practical and actual conditions.

A note due after death. (*Safford v. Graves*, 56 Ill., App. 499.)

A moral obligation. (*Atkins v. Hill*, Cowper's Reports, 288.)

A debt barred by bankruptcy. (*Trueman v. Fenton*, Cowper's Reports, 544.)

Promise to abide by an arbitration. (*Barlow v. Smith*, 4 Vermont, 144.)

A promise to pay a mistress. (*Turner v. Vaughan*, 2 Wilson, 339.)

A promise to indemnify. (*Glass v. Beach*, 5 Vt., 172.)

A promise to support. (*Mills v. Wyman*, 3 Pick (Mass.), 207; *Cook v. Bradley*, 7 Conn., 57.)

It may be argued that because Vermont, Iowa, Rhode Island, Maine, New Hampshire, Massachusetts, and Connecticut or similar States may have already adopted this definition of value that it is desirable for New York. This is not true because of the comparatively slight volume of mercantile transactions and credit extensions found in these various States as compared with the State of New York.

All combined, the seven States mentioned extend about 6 per cent as much credit as is extended in the State of New York.

The exchanges of New York amount to about one hundred thousand millions per year; the exchanges of the entire country, including New York, amount to about one hundred and sixty thousand millions per year.

Approximately 60 per cent of the entire mercantile business of the country is thus done in the State of New York.

The attempt to foist the views of other and smaller States upon the great commercial State of New York is trying to make the tail wag the dog.

The argument is made that this definition follows a precedent set in Great Britain. Conditions in Great Britain are entirely different from conditions in New York, particularly as to the extension of credit. Credit on open account, such as forms the basis for our great volume of business is practically unknown in Great Britain, except in retail trade, where goods are sold for consumption and not for resale. Transactions in Great Britain, where goods are sold for resale, are generally closed immediately by draft with bill of lading attached or by note with satisfactory indorsers. The drafts are accepted by bankers and from that time on the seller relies on the bankers' obligations; and the question of whether the purchaser of the goods sells them for an adequate consideration or on a constructive theory of value is a matter of no moment to the primary seller.

The great shibboleth for the supporters of these bills has been uniformity and sacrifice for uniformity. This argument is all very well in its place, but has its limit. Uniformity in conformity with bad precedent, and based upon an ignorance of the kind of transactions upon which the greatness of the trade of New York and the prosperity of the country dependent upon it has been built up, is undesirable.

A further argument has been advanced by the supporters of the act, viz, that the definition of value is in accordance with the mercantile idea. We presume that it will be admitted that a representative body of merchants is as competent as anybody else to tell what is and what is not the mercantile view.

The Merchants' Association of the City of New York desires to go on record as saying that this definition does not conform to the mercantile view, but that it is utterly subversive of the mercantile view and wholly undesirable and dangerous from the mercantile standpoint.

THE CHARACTER OF THE OPPOSITION TO THE DEFINITION OF VALUE.

The opposition to the definition of value represented by this memorandum is that of the Merchants' Association of the City of New York, an association which has some 2,000 members, which more than any other body may be said to have the largest interest in the law merchant.

The members of the Commission on Uniform State Laws are themselves not in agreement with regard to this definition of value.

In the Proceedings of the Twentieth Annual Conference of the Commissioners on Uniform State Laws, a pamphlet published by the commissioners in 1900, on page 101, the following statement is made:

"One of our colleagues, a commissioner from New York, believes that he has found a divergence from the original and excellent plan adopted by this conference of putting in the form of statutes only those principles of law and certain special subjects that have been crystallized into well-settled principles and have been accepted by a preponderance of authority. He sees in the definition of value and in the definition that 'a thing is done in good faith when it is done honestly, whether it be done negligently or not,' such radical changes in the law as to exhibit not a codification of an existing law, but an endeavor to work a legal reform, and the latter endeavor he deems not only foreign to the purpose of this conference, but dangerous as well."

A note at the bottom of the page contains a reference to the Columbia Law Review of February, 1910, page 118. This reference is to an article entitled "A revival of codification," by Prof. Francis M. Burdick, a professor of Columbia University, and author of Burdick on sales, and one of the commissioners from the State of New York. In this article Prof. Burdick reviews the history of the Commission on Uniform State Laws and comments on the desirability of codification which expresses the existing law as opposed to the undesirability of codification, so-called, which is experimental, referring among other things to the definition of value.

Respectfully submitted.

MERCHANTS' ASSOCIATION OF THE CITY OF NEW YORK.

By EDWARD D. PAGE,

Chairman of the Committee on Commercial Law.

ABRAM I. ELKUS.

CARLISLE J. GLEASON.

Of counsel.

The CHAIRMAN. You are familiar with the decision of the Supreme Court which relieved the railroads—or at least under which they are exempt from liability on these bills of lading. If Congress should pass a law, the effect of which would be to establish a rule the reverse of that which the court laid down, would not that meet this situation?

Mr. PAGE. It would seem to be a very simple solution of it, and meet it entirely.

The CHAIRMAN. That is what has occurred to the chairman of this committee.

Mr. PAGE. That is my impression.

The CHAIRMAN. I will ask you one further question with reference to foreign shipments. If that was done, you would not require legislation with reference to the use of triplicate bills of lading and bill of exchange in your foreign shipments, as you have that already under the existing conditions?

Mr. PAGE. If the suggestion which you made were carried out there would be no necessity for paying any attention to that. That is all covered by the law of merchants, as it is to-day.

Mr. Page was thereupon excused.

STATEMENT OF FREDERICK H. PRICE, 3 SOUTH WILLIAMS STREET, NEW YORK, REPRESENTING THE MILLERS' NATIONAL FEDERATION.

Mr. PRICE. Mr. Chairman, I will file this argument that I have in my hand, instead of further referring to it—in favor of an amendment to either the Stevens-Clapp bill or the Pomerene bill, with refer-

ence to shipper's load and count. It is not necessary to argue it now. I will read for the benefit of those who are here what the amendment is.

To be added to the end of section 4 of the Stevens-Clapp bill, or the corresponding section of the Pomerene bill:

But the carriers, when requested and given reasonable opportunity to examine and verify the contents of any car, shall not insert in the bill of lading issued for the goods therein the words "shipper's load and count," or other words of like purport."

I will now request that this argument be incorporated in the record. The paper referred to is as follows:

STEVENS-CLAPP BILL.

NEW YORK, March 15, 1912.

The CHAIRMAN AND MEMBERS

OF THE SENATE COMMITTEE ON INTERSTATE COMMERCE,

Washington, D. C.

GENTLEMEN: Speaking for the millers of this country, and particularly for those who are members of the Millers' National Federation, it is my duty to state that they will give every support in their power to the Stevens-Clapp bill, and we earnestly hope that that bill, as originally devised, or some other bill having for its object the same purpose, i. e., to make the carrier liable for the acts of his agent in issuing bills of lading, will become the law of the land.

As originally drafted, the Stevens bill was satisfactory in every material respect to our interests, and our interests are perhaps not greatly different from those of other classes of manufacturers and merchants.

Since, however, the proposed bill was originally drafted there have been a number of tentative clauses added to it, with one of which at least we are not in sympathy, and which I am instructed to oppose by our organization, the Millers' National Federation, and by other millers not members of the federation who manufacture the products of corn.

The portion that we object to is contained in the last paragraph of section 4 of the Stevens-Clapp bill, which, as before stated, was inserted, we understand, by the carriers to relieve themselves of liability in a manner we believe contrary to the intent of this proposed bill, and reads as follows:

"The carrier may also, by inserting in any such bill of lading the words 'shipper's load and count,' or other words of like purport, indicate that the property was loaded by the shipper and description made by him; and if such statement be true, the carrier shall not be liable for damages caused by improper loading, or by nonreceipt, or by the misdescription of property described in the bill of lading."

The number of millers who for any reason accept bills of lading from carriers bearing the disqualifying and discrediting clause "shipper's load and count" is very large and their trade is very extensive.

The general conditions which have brought that clause into such large use are that for the purpose of conducting business expeditiously the millers and carriers have agreed upon the necessity of having the shippers load their merchandise into cars rather than have the carriers do the loading.

Nevertheless, it has been well maintained that the shippers are acting in this capacity as the agents of the carriers, and they do not lessen the carriers' liability by so doing. Out of that practice arose the added condition of "shipper's count," which is not a satisfactory condition for very good and satisfactory reasons.

The shipper is obliged to discount his draft attached to order bills of lading in order to do business, and it is against him if he should offer a bill of lading to a bank for that purpose with any disqualifying notations on it.

Therefore, it has been a requirement of the shipper that the carrier should count the contents of cars loaded by the shipper, but in a great many cases, in fact, in almost all such cases, the carriers have for one reason or another generally declined to count the number of packages so loaded, and have insisted on the shipper accepting a bill of lading indorsed "shipper's load and count."

In all such instances the shippers are obliged to accept that document, which they do under a kind of protest—i. e., they object either in writing or verbally. A great many mills are located on one line of railroad only, and in such cases, for instance, the shippers have no other recourse (than to the courts) than to accept the kind of document the carriers give them.

However, the miller, being usually a citizen of prominence in his community, has been generally able to get his draft attached to order bill of lading discounted by local bankers without much difficulty, even though the bill of lading carries a discrediting clause like "shipper's load and count."

The shippers themselves have not in many instances felt the use of this clause to be an intolerable burden, for the reason perhaps that in the absence of legislation to the contrary there have been in existence certain rules drawn up by an association known by some such name as the "Freight Claim Agents' Association," which is composed of the freight claim agents of the majority of the railroads.

Under these rules, which are for the adjustment of claims of all kinds, there is provision for the proper adjustment of claims for shortages arising in connection with shipments covered by bills of lading indorsed "Shipper's load and count" by the carriers.

The rules, not being available to us, can not be quoted here specifically, but it is generally understood that when we can support the facts of our correct loading and count by record and by affidavit, and the consignee can support by his record and by affidavit the facts of the shortage and/or damage at destination, such claims are payable by the carriers, and, in fact, they have been so adjusted as a constant practice hitherto.

I said that this practice has obtained with some exceptions. Nevertheless, the adjustment of these claims has been only arranged, as a rule, after a more or less unsatisfactory correspondence, the tendency of the carriers being to deny liability under such conditions.

It must be further borne in mind that shipments covered by bills of lading marked "Shipper's load and count" may be transferred in transit, perhaps at lake ports or Mississippi River transfer points and other such points of diversion, and this transferring of the contents of cars is done under the supervision of the carriers alone and in accordance with their arrangements with their connecting lines for transportation. At any of these transfer points losses may, and frequently do, occur. In those cases the cars do not arrive at destination bearing the original shipper's or carrier's seals.

These losses at transfer points are due to various causes, such as, for instance, pilfering and errors in reloading into cars. The losses, in fact, are not always exactly recorded or recorded at all. There is nothing in the proposed bill to protect the shippers in such circumstances, and under the terms of the clause we are now criticising such losses would either not be paid by the carriers, because of special exemption from liability by Federal law, or the adjustment of such claims would, in our opinion, only be the result of constant and expensive litigation.

In this and other matters the shippers do not seek to impose upon the carriers any undue or improper burdens of liability. If a shipper accepts without protest a bill of lading containing the discrediting clause "Shipper's load and count," he should not expect to hold the carriers liable for errors and omissions in his loading and counting. Similarly, the shippers should not seek to hold the carriers liable because of the former's misdescription of the property described in the bill of lading.

It is our firm opinion that the moment a law is enacted whereby the carriers are released from liability for loss and for damage, when such a clause is used in the bill of lading, the rules of the carriers hereinbefore referred to will become inoperative or will cease to exist, and the whole burden of the losses which are constantly occurring, under the conditions described above, will fall upon the merchant, who will be without recourse.

Therefore, for all of these reasons, we urge that the whole of the offending portion of the last paragraph of section 4 be stricken out.

If, in your opinion, we are thereby asking too much, we make the further suggestion that it be amended by adding to the proviso at the end of section 4, the following:

"But the carriers, when requested and given reasonable opportunity to examine and verify the contents of any car, shall not insert in the bill of lading issued for the goods therein the words "shipper's load and count," or other words of like purport."

It has been stated by some of the carriers that if they are to be obliged to count the property loaded by shippers into cars, the business of the country will be delayed very materially.

It is not our idea that such a statement, if it is made, should be considered as a kind of threat. We do believe that the matter of counting a shipper's load is one of ordinary detail, which can be taken care of satisfactorily, and by means perhaps of some readjustment of method, perhaps the employment of additional labor at important points where the traffic is heavy, but we submit that it is far better that this detail of counting shipper's load be adjusted by such readjustment of method than that the general body of shippers should be burdened with a liability which properly applies to the carrier who undertakes to transport merchandise for hire.

This amendment has been devised for us by Prof. Samuel Williston of Harvard and Mr. Thomas B. Paton, counsel for the American Bankers' Association, who have been instrumental in drafting the Stevens-Clapp bill.

Another amendment, having the same object, but using different language, was adopted at a meeting in Washington on Thursday, February 29, of shippers and shippers' associations, under the auspices of the National Industrial Traffic League, the names of those present having been handed in to your committee on Saturday, March 2, by Mr. J. C. Lincoln.

It is believed that this amendment, as now suggested, will be accepted by those interested, in lieu of the one they at that time adopted.

Since this matter of the "shipper's load and count clause" has been argued in this connection, it is important to learn that on February 21, 1912, two of the eastern railroads issued a notice to their agents to the effect that shippers who loaded package freight are entitled to a clean bill of lading (without notice as to shipper's load and count, more or less, etc.) for the number of packages loaded, provided that on commencing to load such freight the shippers notified first the company's agent, or his representative, that a clean receipt will be required.

I attach copy of such order herewith, as part of this record.

Respectfully submitted.

F. H. PRICE,
Export Agent, Millers' National Federation.

Athy No. 1714. 300.]

[Circular TBF No. 195.]

BOSTON & MAINE RAILROAD, MAINE CENTRAL RAILROAD CO.,
FREIGHT TRAFFIC DEPARTMENT, TRAFFIC BUREAU,
Boston, Mass., February 21, 1912.

TO AGENTS:

You are hereby notified that shippers who load carload package freight are entitled to a clean bill of lading (without notation as to shippers' load and count, more or less, etc.) for the number of packages loaded, provided that before commencing to load such freight the shipper notifies this company's agent or his representative that a clean receipt will be required.

Be governed accordingly.

W. K. SANDERSON,
General Freight Agent, Maine Central Railroad.
C. H. EATON,
General Freight Agent, Boston & Maine Railroad, Boston.

Issued by F. S. DAVIS,
Chief of Tariff Bureau, Boston, Mass

[H. R. 25335. 61st Congress, 2d session.]

[Legislation affecting bills of lading, to wit, the "Stevens bill," with proposed amendments thereto, for consideration by the United States Senate Committee on Interstate and Foreign Commerce, at the present session of Congress. The proposed amendments are *italicized*.]

A BILL Relating to bills of lading.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

ORDER BILL OF LADING DEFINED.

That whenever any common carrier, railroad, or transportation company (hereinafter termed "carrier") shall issue a bill of lading for the transportation of property from a place in one State to a place in another State (the word "State" to include any Territory or District of the United States), "*or from a place in the United States to any foreign country*" which bill shall be, or purport to be, drawn to the order of the shipper or other specified person, or which shall contain any statement or representation that the property described therein is or may be deliverable upon the order of any person therein mentioned, such bill shall be known as an "order bill of lading" and shall conform to the following requirements:

(a) In connection with the name of the person to whose order the property is deliverable, the words "order of" shall prominently appear in print on the face of the bill, thus: "Consigned to the order of ————."

(b) It shall contain on its face the following provision: "The surrender of this original order bill of lading, properly indorsed, shall be required before delivery of the property."

(c) It shall not contain the words "Not negotiable" or words of similar import. If such words are placed on an order bill of lading, they shall be void and of no effect.

(d) Nothing herein shall be construed to prohibit the insertion in an order bill of lading of other terms or conditions not inconsistent with the provisions of this Act or otherwise contrary to law or public policy.

STRAIGHT BILL OF LADING DEFINED.

SEC. 2. That whenever a bill of lading is issued by a carrier for the transportation of property from a place in one State to a place in another "*or from a place in the United States to any foreign country*" in which the property described therein is stated to be consigned or deliverable to a specified person, without any statement or representation that such property is consigned or deliverable to the order of any person, such bill shall be known as a "straight bill of lading" and shall contain the following requirements:

(a) The bill shall have prominently stamped upon its face the words "Not negotiable."

(b) Nothing herein shall be construed to prohibit the insertion in a straight bill of lading of other terms or conditions not inconsistent with the provisions of this Act or otherwise contrary to law or public policy.

SEC. 3. That a carrier shall be liable to any person injured thereby for the damage caused by the failure to comply with any of the provisions of sections one and two hereof. But an order or a straight bill of lading, notwithstanding such noncompliance, shall be within the provisions of this Act.

SEC. 4. That every carrier who himself, or by his officer, agent, or servant authorized to issue bills of lading, shall issue an order bill of lading or a straight bill of lading, as defined by this Act, before the whole of the property as described therein shall have been actually received and is at the time under the actual control of such carrier to be transported, or who shall issue a second or duplicate order bill of lading or straight bill of lading for the same property, in whole or in part, for which a former bill of lading has been issued and remains outstanding and uncanceled, without prominently marking across the face of the same the word "Duplicate" "*or some other word or words indicating that the document is not an original bill*" shall be estopped, as against the consignee "*in case of a straight bill of lading*" and "*as against the consignee and*" every other person "*in the case of an order bill of lading*" who shall acquire any such bill of lading in good faith and for value, to deny the receipt of the property as described therein, or to assert that a former bill of lading has been issued and remains outstanding and uncanceled for the same property, as the case may be; and such issuing carrier shall be liable to the consignee named in a straight bill, or to the holder of an order bill who has given value in good faith relying on the description therein of the property for damages caused by the nonreceipt by the carrier of all or part of the property, or its failure to correspond with the description thereof in the bill at the time of its issue, or for the failure to mark the word "Duplicate" "*or other word or words as herein-before provided*" upon a second or duplicate bill as indicated above:

Provided that if the property is described in an order or a straight bill of lading merely by a statement of marks or labels upon the property or upon packages containing it, or by a statement that the property is said to be of a certain kind or quantity, or in a certain condition, or it is stated in any such bill of lading that packages are said to contain property of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in any such bill of lading such statements, if true, shall not make liable the carrier issuing the bill of lading although the property is not of the kind or quantity or in the condition which the marks or labels indicate, or of the kind or quantity or in the condition it was said to be by the consignor. The carrier may, also, by inserting in any such bill of lading the words, "shipper's load and count" or other words of like purport indicate that the property was loaded by the shipper and the description made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the non-receipt or by the misdescription of the property described in the bill of lading.

SEC. 5. That every carrier, or officer, agent, or servant of a carrier, who shall deliver the property described in an order bill of lading without requiring surrender and making cancellation of such bill, or, in case of partial delivery, indorsing thereon a statement of the property delivered, shall be estopped, as against all and every person or persons who have acquired, or who thereafter shall acquire, in good faith and for value, any such order bill of lading, from asserting that the property as described

therein has been delivered or partially delivered; and such carrier shall be liable to every and any such person for the damages which he or they may have sustained because of reliance upon such bill *"according to its original tenor and effect."*

SEC. 6. That no carrier shall be liable under the provisions of this Act where the property is replevied, or removed from the possession of the carrier by other legal *"or governmental"* process, *"or authority"* or has been lawfully sold to satisfy the carrier's lien, or in case of sale or disposition of perishable, hazardous, or unclaimed goods, in accordance with law or the terms of the bill of lading, *"or other lawful excuse for such refusal."*

SEC. 7. That any alteration addition, or erasure in a bill of lading after its issue without authority from the carrier issuing the same, either in writing or noted on the bill of lading, shall be void, but such bill of lading shall be enforceable according to its original tenor.

SEC. 8. That every carrier, or officer, agent, or servant of a carrier, who shall knowingly issue an order bill of lading or a straight bill of lading, as defined by this Act, before the whole of the property as described therein shall have been actually received to be transported or shall have come under the actual control of such carrier or of a connecting carrier in course of transit to the carrier whose bill is issued, or who shall issue a second or duplicate order bill or straight bill of lading for the same property, in whole or in part, for which a former bill of lading has been issued and remains outstanding and uncanceled, without prominently marking across the face of the same the word *"Duplicate,"* or some other word or words indicating that the document is not an original bill and every person who negotiates or transfers for value a bill of lading known by him to have been issued in violation of this section, shall be guilty of a misdemeanor, and upon conviction shall be punished by fine not exceeding five thousand dollars or imprisonment not exceeding five years, or both.

SEC. 9. That any person who with intent to defraud shall forge, sign, counterfeit or falsely alter an order bill of lading or a straight bill of lading as defined by this Act, or shall utter, offer, dispose of or put off as true or shall have in his possession with intent so to utter, offer, dispose of or put off, any paper or writing purporting to be a genuine order bill of lading or a straight bill of lading, knowing the same to be fictitious; and a person who, with intent to defraud, shall sell, negotiate, exchange or deliver or keep or offer for sale, negotiation, exchange or delivery, or receive upon any purchase, negotiation, exchange or delivery, any such bill of lading or purported bill of lading, knowing the same to have been forged, counterfeited or falsely altered, shall be guilty of a misdemeanor and upon conviction shall be punished by fine not exceeding five thousand dollars or imprisonment not exceeding five years, or both.

Mr. PRICE. As to the other matter of added freight with added charge, or compensation, the Millers' Federation believe that that should not be allowed in this present bill, but should be governed by the Interstate Commerce Commission under existing law.

That is all I care to say, gentlemen.

The CHAIRMAN. In regard to the statement *"Shipper's load and count"* we have had some statements with reference to that. Do you think that shippers as a rule would accept a bill of lading bearing the words *"Shipper's load and count"* if it was not a fact that it was the shipper's load and count?

Mr. PRICE. They would not accept the bill of lading if the carrier had counted the load.

The CHAIRMAN. No, you do not understand me.

Mr. PRICE. I beg your pardon.

The CHAIRMAN. Of course a bill of lading bearing the words *"Shipper's load and count"* would be discredited as security, would it not?

Mr. PRICE. Yes, sir.

The CHAIRMAN. The shipper accepting such a bill of lading, consequently, if he wanted to use it on the basis of credit, would not accept it unless it were a fact?

Mr. PRICE. No, sir.

The CHAIRMAN. That is the point.

Mr. PRICE. He would not, but the only difficulty we have found is that in many places in this country a shipper asks the carrier to check or verify his account, and the carrier does not do so and he has to accept, and he has accepted, a bill of lading marked "Shipper's load and count" because it was in fact a shipper's load and count.

The CHAIRMAN. You think then that the shipper is, in a measure, coerced into accepting the shipper's load and count bill as a fact and as a statement?

Mr. PRICE. Yes, sir; I do.

There being no further questions, Mr. Price was thereupon excused.

STATEMENT OF ROBERT M. RICHTER, OF THE FIRM OF PHELAN BEALE, ATTORNEY, OF 2 WALL STREET, NEW YORK CITY, REPRESENTING THE BREMEN COTTON EXCHANGE OF BREMEN, GERMANY, AND CERTAIN MEMBERS OF THE NEW YORK COTTON EXCHANGE.

Mr. RICHTER. Mr. Chairman and gentlemen of the committee: On the 5th day of January, 1911, the Bremer Baumwollbörse, of Bremen, Germany adopted certain preambles and resolutions, the originals of which were forwarded to the President, to the United States in Congress assembled, and to the committees of the Senate and of the House of Representatives, whose province it was to deal with legislation concerning interstate and foreign commerce. The resolutions, as adopted, are as follows:

Whereas the United States of America, by reason of its natural advantages, supplies the markets of the world with raw cotton, a product that is most necessary and valuable to mankind; and

Whereas under the present method of marketing cotton, consignments are made from remote points in the Southern and Southwestern States of the United States, upon railway bills of lading of common carriers, which said ladings are attached to drafts drawn on the consignees of said cotton; and

Whereas the said drafts and bills of lading in due course are presented to the consignees for acceptance or payment a considerable time before the cotton arrives at its destination; and

Whereas by the rule of law as enunciated by the Supreme Court of the United States, a bill of lading, although issued by an agent of a common carrier, is rendered valueless unless the property described therein actually has been delivered into the custody of the carrier; and

Whereas prior to the acceptance by the consignee of the drafts, there is no means by which the said consignee may ascertain whether the cotton described in the bills of lading attached to said drafts has been received by the carrier which the bills of lading purport to have received the cotton; and

Whereas the consignee is thereby, although an innocent party to the transaction, left without means of protection; and

Whereas the recent forgeries of bills of lading of various carriers within the United States have caused enormous financial losses to German citizens, as well as to citizens of other countries, and such frauds were possible because of the insecurity of bills of lading and of the inability of the consignee to rely upon their genuineness; and

Whereas the disturbance in the cotton market caused by the feeling of insecurity in bills of lading has affected the transactions in the cotton trade between Germany and the United States, amounting to many millions of dollars each year, and has likewise affected the money exchange market between the two countries; Now, therefore,

Be it resolved, That His Excellency, the President of the United States of America, respectfully be invoked to lend his efforts towards the enactment of legislation by the United States in Congress assembled—

(a) That there be imposed upon all carriers in the United States an obligation to safeguard bills of lading issued by such carriers so that a bill of lading may become an instrument having integrity and merit.

(b) That it be a crime against the laws of the United States for an agent of any carrier to sign or issue a bill of lading unless the goods described therein be then in the actual possession of the carrier for which the said agent acts.

(c) That it be a crime for any person to forge or utter a forged or spurious bill of lading, thereby so restoring to a normal condition the now troubled state of the cotton trade, that undisturbed business relations between the two nations may be resumed and continued; and

Be it further resolved, That one original set of these resolutions be sent to His Excellency, the President of the United States, and another to the United States in Congress assembled.

Respectfully submitted.

BREMER BAUMWOLLBÖRSE,
By its PRESIDENT.

[SEAL.]

Attested: By its SECRETARY.

The members of the Bremer Baumwollbörse, of Bremen, Germany, were perhaps the heaviest individual losers in the Knight-Yancey-Steele-Miller cotton frauds, the amount being in excess of \$2,000,000. As the resolutions state, the forgeries of bills of lading of various carriers within the United States have made the trade relations between Germany and the United States a cause of much anxiety to the German trader, and it was for these reasons, as stated in the preambles, that the Bremer Baumwollbörse has invoked the President and Congress to bring about the enactment of legislation which will first impose upon the carrier a liability upon the bills of lading which it issues and in order that no bills of lading be issued except true ones; they ask that it be a crime against the laws of the United States for any agent of a carrier to issue a bill of lading without having received the goods therefor, and that it be a crime for any person to forge or utter a forged or spurious bill of lading. It is in the interest, therefore, of the Bremer Baumwollbörse, of Bremen, Germany, and its members, and also in the interest of certain members of the New York Cotton Exchange, that I appear before you as a proponent of the legislation now under your consideration. It is, of course, true that no legislation can be enacted which will make a carrier liable for bills of lading issued by others than the agents of the carrier, and it is to safeguard against this possibility that the cotton brokers of Germany have asked that it be made a crime against the laws of the United States for anyone to issue such a bill of lading or to negotiate the same. Such a provision will undoubtedly act as a deterrent, and from what I have gathered from the hearings before this committee I do not think that there is much opposition to the enactment of such criminal provision.

The rest of the legislation proposed has to deal principally with the liability of the carrier for bills of lading issued by its own agents.

What opposition the railroad representatives have developed to the proposed legislation now before this committee can be tersely said to be founded on four general principles.

First. That the law of the United States is well settled by the Friedlander case that the duty of a carrier does not arise until some consignment is actually in its possession and that a carrier is not liable for the unauthorized yet customary acts of its agent until the receipt of the goods sought to be transported.

Second. That there is no necessity for any legislation of this character which they contend so radically changes the law of agency as it affects the liability of the railroads.

Third. That any change in this liability would cause such a change in the present method of issuing and handling bills of lading that there would be an increase of labor to the railroads resulting in the clogging of the wheels of transportation and a serious delay in the commerce of the United States.

Fourth. That whether the Friedlander case is right or wrong, whether the law as laid down by that decision in the Supreme Court of the United States is right or wrong, the law remains, and the present freight rates as charged by the railroads have been set with the freedom from liability as established by that case in mind, in that there is no assumption by the carrier of risk of loss due to the issuing of false bills of lading by its agents, and therefore there has been no charge made for that risk. The railroads state, that should this increased liability attach to them by reason of this legislation, there will be an increased burden, and an increased risk, which perforce must give them the right and authority to ask an increased rate for freight transportation.

With all due respect to the Supreme Court of the United States, I doubt whether the flintlock decision of the Friedlander case would have been handed down by the same court had the question arisen at this time.

In 1888, when the population of this country was grouped together in small localities far removed from one another, the few railroads then existing as the connecting links between these localities were undoubtedly the main factor in the growth of prosperity of the United States. Bills of lading were at that time little more than receipts for goods delivered and had few of the incidents of negotiable paper or securities attached to them. Business was not carried on based on these receipts to any large extent. The goods would arrive at their destination at the same time as the bill of lading, and with the three days of grace then fairly prevalent, the consignee, the actual purchaser would have sufficient opportunity to examine the consignment itself and decide whether he cared to pay the draft or not.

But this is 1912. Business has changed. The slow-moving train carrying freight, passengers, and mail has given way to the Twentieth Century Limited, which carries mail for delivery in New York the day after posting in Chicago. The days of grace have disappeared, so that now the consignee must purchase his goods within two days after shipment from Chicago, although, moving by freight, they do not arrive in New York for several days thereafter. Formerly a draft attached to a bill of lading was paid after the goods arrived and after an examination of the actual consignment itself by the purchaser. In other words, the consignee paid the draft because he had satisfied himself that the goods were worth the money so paid. Now he pays the draft relying solely and completely on the representations made in the bill of lading attached to the same. It is a remarkable tribute to the integrity of the railroad agents that this practice has become so customary and usual. It would never have arisen and grown as it has if at the outset the bills of lading were not in most instances found to be properly issued for goods actually in the hands of the carrier.

This instrument, because of change in business, has therefore taken on the incidents of negotiable paper. Just as I cash a check drawn by some one whom I do not know only when it is indorsed by some one of whose financial responsibility there is no question in my mind, so

the consignee pays the draft of the consignor because the railroad has effectually indorsed that draft by issuing a bill of lading. The consignee does not now, as formerly, buy the consignment itself; he buys instead a slip of yellow paper which he believes is what it purports to be. The Supreme Court of the United States, keeping pace step by step with the growth of business, in the light of these business conditions would hardly have rendered the now famous Friedlander decision.

On June 29, 1906, Congress passed the Carmack amendment to the Hepburn Act, which provided, briefly, that the initial carrier in a consignment shall be liable to the lawful holder of its bill of lading for any loss, damage, or injury to the consignment, whether caused by it or by any of its connecting carriers.

In the case of *Atlantic Coast Line v. Riverside Mills* (219 U. S., 186) this amendment, by a unanimous court, was held to be constitutional on the theory that the connecting carriers as a matter of law and fact were the duly authorized and constituted agents of the initial carrier for the purposes of the contract of transportation, and that the initial carrier as principal must be held accountable for all of the acts of its agents, the connecting carriers, in the transportation of this consignment.

It was stated here by Mr. Senator Faulkner that Congress has never yet enacted a law which was contrary to the decisions of the Supreme Court. I desire to take exception to that remark, for the court says, on page 197:

The general doctrine accepted by this court in the absence of legislation is that a carrier, unless there be a special contract, is only bound to carry over its own line and then deliver to a connecting carrier.

Yet, if the entire opinion is read, it must be noted that in spite of the fact that the law was otherwise, the court has molded its decision along the lines of custom, public necessity, change in business conditions, and good law, and out of these evolved the principle that the initial carrier as principal must be responsible for the acts of its agents.

Although the law was otherwise, the opinion says, at page 205:

Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one State to be transported to a point in another, involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent and to incur liability throughout the entire route.

And, at page 206:

Congress has said to such carriers, "If you are obliged to use the services of independent carriers in the continuance of the transit you must use them as your own agents."

Under this decision it matters not how the loss may occur to the holder of the bill of lading, or on what line, whether by misfeasance or malfeasance, whether through an agent on the line of the initial carrier or on the line of a connecting carrier, whether by the authorized or unauthorized act of an agent, the initial carrier, although it may be wholly blameless and may have had no part in or benefit from the loss, is nevertheless held liable for the same.

In the face of this opinion, which, as it states, is contrary to the then law of the land, but which is founded on changed conditions in business and customs, is it not fair to presume that the Supreme

Court would to-day render a decision contrary to the one laid down in the Friedlander case?

The second point made by the railroads is that there is no necessity for any legislation of this kind, and they state that in many years they have heard of no case where a bill of lading was issued by the agent of a carrier without the actual receipts of the goods. Aside from what has been shown here I do not know of any case myself, but I do charge as Mr. Beale did in his statement made before you, that the practice of forging bills of lading where the shipper himself signed the name of the agent to a bill of lading and negotiated the same is countenanced and abetted by the railroad companies.

I have here a part of the record of the criminal proceeding against John W. Knight, of Knight, Yancey & Co., as well as the record on appeal of *Lovell v. Hentz*.

It would encumber the record if I read all of the testimony supporting my contentions, suffice it to say that the testimony shows that the railroads were fully aware of the signing by Knight of bills of lading with the name of the agents when no goods had been delivered, and that the agents of the railroads when apprised of the condition of affairs, instead of at once repudiating these bills, actually ratified them by sending false messages to the holders of the bills to the effect that the goods were on their way when as a matter of fact no goods were in the possession of the railroads.

Let me tell you the whole story of the cotton frauds as they appear here. This story is based on the records. We must remember that at the trial Knight was a convincing witness and answered all questions as fully as he was able so to do. Many character witnesses testified in his favor and he was subsequently acquitted. The fact that he showed that permission from the railroads had been given him to sign the bills of lading played a most important part in his acquittal.

Knight, Yancey & Co. started in business in about 1901-2 in the business of buying and selling cotton, that is, buying from the cotton planter and selling to cotton brokers. On May 30, 1905, an audit of the books of Knight, Yancey & Co. showed that the said firm had made a profit for the fiscal year of about \$30,000. About this time an arrangement had been made between Knight, Yancey & Co. and the L. & N. R. R. Co. by which the railroad allowed the firm of Knight, Yancey & Co. to date back bills of lading.

For instance (as Mr. Knight testified), if we would sell 1,000 bales of cotton to a mill in Carolina for December shipment and we got the cotton bought in December and got it en route on cars from the concentrating point and would not be able to get it from the concentrating point in time to ship it in December, we arranged with the L. & N. R. R. Co. to let us date back those bills of lading.

At the suggestion of his partners, Mr. Knight went to Europe in the summer of 1905 to see if the foreign business done by the firm could not be increased. When he returned some time in August, he found, after checking over the business with his partners, that there had been lost while he was gone about \$180,000, and that the firm owed about \$150,000 more than they could pay. There had been no loss by speculation and he never was able to find out the cause of the loss, except that he thought it went into the widening of the market between spot cotton and futures. In September or October, 1905, shortly after his return, a cablegram was received from Havre, France, asking for the whereabouts of some cotton and giving the marks. It seems that about 1,700 bales of cotton had

been invoiced and drawn for that had never been shipped. Mr. Knight stated that the firm filed it all.

In response to a question concerning these bills wherein he was asked if any complications arose in his shipments over the L. & N. R. R. Co., Mr. Knight testified:

We had called to our attention some bills of lading that had been issued by Knight, Yancey & Co., where the freight rate in the bill of lading issued by Knight, Yancey & Co. differed from the freight rate in the bills of lading issued by the freight agent. Our attention was called to it by Mr. Bywater (foreign freight agent), of the L. & N. R. R. Co., and he came to Birmingham to see me about it and I explained to him what I mentioned to you gentlemen a few minutes ago, about the billing out and drawing for and the invoicing of the 1,700 bales of cotton. I explained it to him fully and he understood all about it.

That is, the bills were signed by Knight's office and then much later the cotton was actually shipped on genuine bills of lading. There were certain discrepancies between the genuine bill and the forged bill. It seems Mr. Knight did not know who signed these bills of lading. They were signed in his absence by some party other than the railroad agent.

Reading again from the record:

Q. You explained that to him?—A. I explained to him what I had found and the reason for the discrepancy between the bills of lading, and I also explained how we had filled them all. I talked to him about it. We discussed it fully and after some two or three weeks of my importuning him to let us utilize that system in financing our business, he gave me permission to do it.

By the court:

Q. I do not understand.—A. He gave me permission to issue bills of lading myself.

Q. You mean to sign the railroad agent's name to it?—A. Yes, I suggested it to him and told him we would be able to give him additional business, a great deal more than we had been giving him, and he consented to it. We used that system on up through 1906 and I don't think we had any trouble to speak of with any irregularities in the bills of lading, although they would be issued of to-day's date by us and probably the cotton not shipped for two months.

Referring again to the 1,700 bales of cotton, it seems that Mr. Bywater told Mr. Knight that he had instructed the Serra Steamship Line to deliver the cotton regardless of any discrepancies in marks, weights, etc., and had received from the steamship line the bills of lading that Knight had originally issued. He not only told Knight he had received them, but he brought them to Knight's office and showed them to him. Mr. Bywater knew that Knight issued them and Knight never denied that he had issued them, nor did he ever attempt to conceal that fact. This method of doing business continued up through 1907, and by it the number of bales handled was increased because the method saved Knight, Yancey & Co. considerable money, and helped them to finance their business as well. Mr. Knight said that the percentage of business handled in that way was at least 50 per cent and exceeded more than 100,000 bales per year.

It seems that after the money had been received on the strength of the false bills of lading, Knight, Yancey & Co. would then purchase cotton and actually ship the goods, retaining the genuine bills; that is to say, the intent on the part of Knight, Yancey & Co. was to buy the shipment with the consignee's money rather than to fail to make any shipment whatsoever.

Mr. Knight testified to other incidents where inquiries were made from other points, notably, Liverpool and Barcelona, Spain, concerning cotton bills of lading which had been received, but where no cotton was found to accompany the said bills. In the case of the

Spanish consignment, it seems Mr. Bywater telephoned to Mr. Knight over the long-distance telephone and stated to Mr. Knight that he (Mr. Bywater) had had an inquiry from the Spanish consul relating to 800 bales of cotton consigned to the Barcelona firm. Mr. Bywater, after the conversation, wired the Spanish consul that the cotton had been shipped, when, as a matter of fact, it was not shipped until two weeks afterwards or thereabouts. Bywater inquired from Knight during this interval about the shipment and sent him the following telegram: "I certainly hope you will get this cotton out. If you don't we will both be in a hole."

In April, 1910, a cablegram was received by Mr. Knight from Bremen, Germany, relative to 7,000 bales, the bills of lading for which had been received, but 4,300 bales of which could not be found. Mr. Knight read the cablegram over the telephone to Mr. Bywater. Mr. Bywater explained to Mr. Knight over the telephone that he had been in New Orleans a day or two prior to that; that he had left his clerk in charge; that his clerk had inadvertently sent a cablegram to the steamship company that only 2,700 bales of cotton had been shipped. He told Mr. Knight further that he would correct this mistake and cable the company that he had the 7,000 bales. The next day Mr. Knight received a cablegram from Bremen stating that they had received a cablegram from the steamship company showing that everything was satisfactory. Mr. Knight, in detailing this custom states (reading from the record):

Q. I will ask you if it was your custom or system to go ahead and fill with actual cotton of corresponding marks and weight the bills of lading that you had previously issued without having the cotton.—A. Yes, sir; it was our custom to fill all shipments, filling all bills of lading or all invoiced bills of lading which we had issued ourselves with actual cotton and allow that cotton to go forward, and we kept the bill of lading issued by the railroad agent until such time as we knew the cotton had been delivered on the other side and then destroy it.

Q. I will ask you whether the original bills of lading afterwards issued by the railroad agent were ever used in any way.—A. No, sir; we kept them until we found the cotton was delivered on the other side, then destroyed them.

Q. About what was the extent after you discovered this system was inaugurated; what was the extent of bills of lading issued by Knight, Yancey & Co. without the agent's signature that were filled with actual cotton?—A. I should think half a million bales of cotton.

Q. Have you any of the bills of lading or duplicate bills for the cotton that was actually filled in?—A. Yes, sir, a whole box full of them over there that I turned over to the trustees. That is not all; there is nearly that many more abroad.

Q. These were the actual bills of lading issued by the railroad company for cotton previously issued by you?—A. Yes, sir.

Of course, these instances, as shown, are but a few of the steps in the entire transaction, originally starting out with the permission of Bywater, but later distinctly ratified and aided by him. From the mere dating back of a few of their bills of lading, the permission became a license, and Knight, Yancey & Co. in April, 1910, were issuing bills of lading broadcast signed with the agent's name for cotton which was never delivered to the railroad. It must be remembered, however, that this was done with the permission and consent of the railroad company, and that Bywater was the foreign freight agent of the L. & N. R. R. Co. Mr. Knight testified as to this as follows (reading again from the record):

By the Court:

Q. What did you mean by bills of lading issued by you?—A. They were issued by my authority.

Q. Without the signature of L. & N. R. R. Co. agent at Decatur?—A. Yes, sir; at Decatur or wherever it was

Q. State whether or not there was any discussion between you and Mr. Bywater as to any inducement or any consideration to his road for that business.—A. I told Mr. Bywater that if he would allow us to do this we would give him a great deal more business through the port of Pensacola. We were then shipping about 40 per cent through Pensacola and we increased it to 60 per cent of the total cotton that the L. & N. R. R. handled.

Q. What did he say about that being an inducement to ship cotton through Pensacola?—A. He said they were trying to build up the port of Pensacola and owned steamship lines there, etc.

Q. What was the authority given you; tell the jury in Bywater's language what authority, if any, he gave you to sign the L. & N.'s name or the agent's name to the bill of lading?—A. He told me I could go on and issue bills of lading like the ones we had been issuing for the dating back of cotton previous to 1905, and like these that had been issued that I had just found out and told him about; that we would be allowed to issue bills of lading, fill out the cotton and draw for it, and thus save the interest on it.

Q. I understood you to say that is your conversation with Mr. Bywater?—A. He gave us permission to use it, and various times since then we had talks about it. I told him about how big a percentage one time we handled under that bill of lading.

Q. What did you say about it?—A. It was all right; glad to get the business.

Q. How much cotton did you ship over the L. & N. R. R. under that system?—A. I could not give anything more definite than an estimate. I should say within one season 200,000 bales. The L. & N. R. R. handled probably 130,000 or 140,000 bales.

Q. About what freight would they get out of that?—A. That would have to be approximated. It would be about \$2.50 a bale, from the original point of shipment to Pensacola.

Q. In round numbers, what would that amount to?—A. About \$330,000 to \$340,000, or something like that.

Q. Mr. Knight, what was said, if anything, between you and Mr. Bywater as to whether you should make this thing notorious, or whether you should keep it a secret, and what reason, if any, was assigned?—A. Mr. Bywater cautioned me in Birmingham at the time he came down with these bills of lading that had been turned over to him from Liverpool, and cautioned me not to say anything about it to the local agents, because he said it would be up and down the whole system in a very short while.

Q. State what effect he said it might have on the other agents of the system?—A. He said it would get all over the whole L. & N. system and everybody would be wanting to use it.

In order to show further that Bywater, who as you will remember, was in sole charge of the foreign freight business of the L. & N. R. R. Co., had given authority to Knight's firm to issue false bills, let me read one letter written by him to Knight, Yancey & Co.

It seems that Knight's firm had issued bills of lading on some cotton which, as usual, was not delivered, and that the ocean rate in those bills was different from the rate which would be noted in the genuine bills about to be issued. Mr. Knight telephoned to Mr. Bywater that he wanted him to arrange that when the cotton was billed out on the genuine bills from which would be made up the ship's manifest the rates on both bills would be the same. Mr. Bywater's letter is as follows:

LOUISVILLE & NASHVILLE RAILROAD CO.,
OFFICE OF FOREIGN FREIGHT AGENT,
Louisville, Ky., U. S. A., November 10, 1905.

Messrs. KNIGHT, YANCEY & Co.,
Decatur, Ala.

DEAR SIRS: Your favor of the 9th.

In conversing with you over the phone the other night I did not know just what engagement you had in mind, but understood that the inland proportion at which we were billing was at variance with that you had prepaid, and I replied that I could adjust the billing so the inland proportion would agree with the amount you prepaid and the ocean on which you were figuring.

I gather now, though, from phone conversation this morning and your letter above referred to that the change you wanted to effect pertained to 500 bales offered us on

contract B-277 and which we declined on account of that contract having been filled. Mr. Jackson explained to you over the phone this morning that you had overshipped contract B-282, 500 bales, and contract B-290, 100 bales, total 600 bales, and that he had applied 500 bales of this overplus on contract B-277, which was for 500 bales, and still open on our books. It appears he gave such instructions as would insure correction of all our records, including the ship's manifest, and took the further precaution to have the captain of the vessel understand that the original bills of lading, which would be handed him, bearing contract numbers B-282 and 290, would appear on his manifest under contract B-277. This change in contract numbers should not have been made without arranging to correct the original ladings. However, the matter has now gone too far to permit of rectification, but as full instructions have been given all concerned, I take it, that will not be necessary.

As I said before, we can readily arrange at any time to change the inland and ocean proportions to correspond with the basis of your sales.

With respect to the 500 bales offered us on contract B-277 and which we declined, we can not now accept these at less than 74 cents from Montgomery.

Yours, truly,

J. A. BYWATER,
Foreign Freight Agent.

All of these facts are further substantiated in the record of Lovell v. Hentz. In that case it was shown by correspondence that on April 8 Hentz & Co. requested the agents of the L. & N. R. R. Co. at Selma and at Decatur for information as to route and location of the cotton for which they had the bills of lading.

No reply was received from the agent at Selma until April 14, when in reply to a wire from Hentz & Co. for information he wired that the cotton had been shipped all rail L. & N. to Cincinnati, unrouted beyond, and that he was tracing for quick time. It took that agent six days to reply as to the whereabouts of 300 bales of cotton for which the inquiry stated he had issued bills of lading.

Practically all of the above testimony referred to the arrangement between Mr. Knight and Mr. Bywater, of the L. & N. Road.

The Southern Railway Co. was also a party to an arrangement of this kind, as appears by the testimony of Mr. Knight in the record, as follows:

Q. Will you state if there was any conversation of that kind or any transactions of that kind with any agent or official of the Southern Railway Co.—A. Yes, sir.

Q. State the position of that gentleman.—A. Division freight agent of the Southern Railway Co., Selma, Ala.

Q. What was that?—A. Mr. J. W. Hunter.

Q. State what occurred between you and him along this line.—A. It was some two years after we had the arrangement with Mr. Bywater that Mr. Hunter came to me and asked us for business out of Selma and insisted time and time again that we give him as much business out of Selma as we were giving the L. & N. R. R., and I told him we could not do it. I had known him a long time and explained to him that we could not do it, and he did not understand why at that time, but I think he suspected why. At any rate, he came to me and told me he could do as much for us as the L. & N. R. R. was doing. I told him as nearly as I could what they were doing, to find out if he would be willing to do it himself. My recollection of what I said to Mr. Hunter was that the L. & N. R. R. Co. had been allowing and were then allowing us to issue bills of lading when we wanted cotton dated back for us to do it ourselves by the issuance of those bills of lading, and he said that he could do as much, that is, allow us to issue bills of lading when we wanted to date cotton back; that he could do that much. We issued some of these bills of lading for domestic shipments, that is, for shipments to points in this country. For instance, to Carolina mills and to eastern mills when we wanted to date back cotton when we did not have the cotton so we could put our hands on it and our contract was due, we would issue bills of lading ourselves according to this arrangement with him and sent it on by draft to the bill and then fill in the cotton a week or 10 days later. That was in the winter of 1907, between January and March that we made this arrangement with him. In the fall of 1907 I called Mr. Hunter over the telephone during September and stated to him

that I had received a cable from Havre, France, saying that 100 bales of the cotton that we had issued bills of lading for through Selma, and 100 bales we had issued the bills of lading for from Decatur were being held up by the steamship company in Havre, on account of discrepancies in dates of the bills of lading held by the steamship company and the date of the bills of lading held by the man to whom we had shipped the cotton. The cotton was there and the steamship company would not deliver it on the bills of lading we had issued, because they suspected they were not right. I asked Mr. Hunter to please cable the proper parties and have the cotton delivered. He told me that the proper parties to telegraph to were the steamship agents in Savannah, and that he would telegraph there, and afterwards he called me up and told me that he had so telegraphed. I called up the steamship agents and asked them if Mr. Hunter had done so and the agents said that they had already gone over to Williams & Co., with Mr. Hunter's telegram and arranged the matter satisfactorily.

Mr. Knight testified to similar inquiries for cotton handled over the Southern Railway Co., and subsequent conversations with Mr. Hunter, which he fixed up in the same way concerning shipments from Mobile, Ala., to Greensboro, N. C., and to Charlotte, N. C., and other shipments.

At the last hearing I stated the facts brought out in the case of *Lovell v. Hentz*, which applied to the Southern Railway and which substantiated Mr. Knight's testimony. I will not burden the record with their repetition. It is a significant fact that both Bywater and Hunter are still in the employ of the railroads in spite of the above facts further showing a ratification by the railroads of the fraudulent procedure.

It is quite interesting, however, at this time to note that in a suit which is being brought by the defrauded consignees of Knight, Yancey & Co. against the railroads, that Judge Grubb, of the district court of Alabama, before whom the case is, has just ruled on the demurrers interposed by the railroads overruling them on the theory, as he pronounced from the bench, that if the railroads had knowledge that Knight was issuing forged bills of lading and allowed this to continue over a term of years, they would be estopped from denying Knight's agency as against innocent third parties who suffered.

One of the main lessons from these facts other than the assent to this practice by the railroads, is that the agents who had large departments or territories under their control in the business of handling freight—that is, men of responsible positions, were the ones who were most intimately connected with the frauds. Much has been suggested about a plan of validating by a general agent the signatures of the agent issuing the bill. Of what benefit would that be to the holder of a bill when the agent who would probably validate the bill is the agent who was chiefly responsible on his road for the false billings. The railroads deny the authority of Bywater and Hunter in the cases against them. How can they consistently do otherwise than to deny the validating agents' authority to validate other than true bills.

A little over a year ago when Mr. Beale was in Germany in conference with Bremer Baumwollbörse relative to these southern frauds, and after the validating scheme had been put in operation, one of the members of the exchange there showed Mr. Beale a validated bill of lading originating from some point in Texas, where the bill had been signed and issued by the validating agent and then he had validated his own signature on the bill. If the principle of the Friedlander decision is the law to-day, in what better position would that con-

signee be if no goods had been received by the carrier when that agent signed and issued the bill? The railroads would have just as vigorously contended that no duty arose in the carrier because it had received no shipment of cotton upon which to predicate that duty, and that the act of the agent in issuing the bill before the receipt of the goods together with his act in validating his signature, were acts unauthorized by the carrier and as in the Friedlander case, so beyond the scope of his authority that there would be no liability on the part of that carrier. Certified signatures and validating schemes are but makeshifts which do no more than putty the leaks. It would be a far simpler matter for the carrier to be made liable for his agents and employees as it should be, and let the carrier devise what means it can, without conflicting with the commerce of this country, to guard itself against loss and damage by reason of the acts of its agents and employees, just as every prudent and reasonable business man protects his finances from similar depredations.

Thirdly, the railroads claim that this legislation if enacted will cause such a necessary change in the issuing and handling of bills of lading by the carrier as to cause a resultant delay in the transportation of freight. This contention I shall pass over with but this remark:

With the increase in the number of carriers and the consequent increase in competition, some way will be devised by the carrier to overcome this obstacle in order to increase the volume of freight which it transports. The shipper has and always will demand a speedy handling of his goods and will send his consignments over the lines which will most speedily deliver them to his consignee. Under those circumstances it is only a natural result that the carrier soliciting his business will do all in its power to assist the shipper and move his goods with the same speed as formerly.

The fourth point made by the railroads is a peculiar adaptation of that old proverb "Circumstances alter cases." What a clever anomaly it is. Sincerely and firmly stating that in all of the years in which each of the representatives has been associated with his company no situation has ever occurred to which this proposed legislation could be applied, that there has been in all of these years no agent of the railroads represented who has to the knowledge of the representative, issued bills of lading without the receipt of the goods, and that had the railroads in the past been held to the same degree of liability as this legislation proposes to place upon them, there would to their knowledge have been no resulting loss to their respective railroads; in the face of these statements that there has been no loss in the past, the representatives ask that an increased rate for freight transportation be allowed them on the theory that they will then have an increased risk in their business. Although they affirmatively state that there would have been no loss to them even if they were held liable in the manner proposed, yet they ask the shipper to assume the extra expense of guaranteeing against a risk which they themselves contend does not exist. They state that a small percentage only of bills of lading issued by the railroads are attached to drafts, which the consignee must pay before he receives the goods but yet they ask for the power to charge for all bills so issued. What a money-making scheme that is. No risk to assume, no loss of any consequence to indemnify, and yet they ask the ship-

per to pay a premium on his bill of lading. To make the risk even less possible, they ask too that criminal penalties be imposed upon any agent who falsely issues a bill, as a further club to prevent loss to the railroads.

I am not opposed to the criminal penalties, but I see no reason why the railroads should be paid for something which they say does not exist.

The Carmack amendment placed upon the carrier an added burden, that of liability, even though an innocent party to the holder of a bill of lading, and the further burden of recovering from the carrier actually responsible. Yet there was no resulting increase in rate. The initial carrier, to the use the phraseology of the railroads, now "guarantees" the shipment over its lines and the lines of all its connecting carriers. There is a distinct risk added by legislation, yet Congress has not allowed an increase in rate and the Interstate Commerce Committee has not changed the rate schedule. Congress realized that business conditions demanded a change in the law. This legislation is exactly similar, clearly stating it to be the duty of every carrier as principal to be responsible for all the acts of its agents within the scope of their authority. That is the law of agency to-day. That would be the law in this particular situation if it were newly decided to-day. Why, therefore, should the railroads receive extra pay for performing something which is a part of their carrier's duty and for which they are paid now?

Representing a foreign country and speaking also indirectly for the other cotton exchanges of England and the Continent who are also anxious for the enactment of legislation which will help to make safer their purchases in the United States, it is the Pomerene bill now before you which I respectfully urge that you consider favorably. The Clapp bill has no provision covering foreign bills, a provision which is found in the Pomerene bill. There is no provision in the Clapp bill making it a crime to issue or negotiate false or forged bills of lading and I do not see how the Clapp bill would prevent the evils under consideration without the criminal amendment as such deterrent.

Germany alone buys \$150,000,000 worth of cotton from the United States, all on order notify bills of lading with drafts attached. England and the continent buy \$450,000,000 more in the same way. That is but one commodity. I have no figures to show exactly the amount of the exports handled on order bills but it must be conceded that they would run into many hundreds of million dollars each year. So the foreign cotton men come to you and ask that consideration be given to that vast volume of business and that the same be more securely protected.

**STATEMENT OF OTTO KEUSCH, GRAIN BROKER, MEMBER OF
THE NEW YORK PRODUCE EXCHANGE; 432 PRODUCE EX-
CHANGE, NEW YORK.**

Mr. KEUSCH. Mr. Chairman and gentlemen, I am in the grain brokerage business and commission business, and I stand here as a victim of the loss of \$100,000 through false bills of lading issued by the Delaware & Hudson Railroad Co. during the period from December 1910, to about May, 1911. We have always regarded bills of lading as good as money. They are payable as currency at the banks, and the banks accepted them as such, and we never for one moment

doubted that when a railroad agent put his signature to a bill of lading there would be any trouble about collecting whatever was due on it whether the bills were collected or not.

In this case I present you some copies of bills of lading which proved false to a certain extent. For instance, I have one calling for 10 carloads of corn dated January 14, 1910, at Albany, duly signed by their agent, of which only 7 arrived; the other 3 never showed up. I have another one dated January 19 at Albany for 3 carloads of oats, of which only 2 arrived, 1 did not. I have another one dated February 9 for 2 carloads of corn which never arrived.

I have altogether about 153 carloads of such ladings for grain that never arrived. I advanced in totals to the Durand & Elmore Co. on those bills of lading about half a million of dollars in the course of five months, of which 333 carloads arrived. The balance the railroads put up the contention that they never had received the grain, and in consequence were not liable, as to which they are mistaken, as I have the pleasure to say that in the trial which terminated June 30 in New York, known as the Denike action against the Delaware & Hudson Co., I did recover a judgment for the sum of \$94,000, covering just those bills of lading which the railroad is appealing, and it is a pleasure to note that we were fortunate in having a New York State corporation to deal with, which was obliged to agree with and abide by the decision of the courts of the State of New York which bind them conclusively as to their liabilities.

The railroad company's contention has been that we were negligent in not looking after this matter, but as to that I wish to point out here that six weeks prior to the failure a letter was written to that railroad company asking them to verify those bills of lading. The railroad company never replied to that letter, but sent two or three representatives to investigate, and they informed the bank that the bills of lading were all right. Three days later I received a telephone call from my shippers, Messrs. Durand & Elmore, who informed me that they had decided, in view of the fact that the banks were getting after the railroads to move the grain and cancel the billing as the market in New York did not warrant shipping, leaving me wholly in the dark as to whether anything was wrong or not, and they sent me down a check for \$50,000 and informed me that I should keep the ladings until the goods arrived. But he changed his mind an hour later and said would I please return those papers. It seems that in the meantime the railroad company got hold of those bills of lading but never notified anybody who held them what had been done, or what had happened. They had discharged the agent, and it was found at the trial that this agent left the bills of lading in the office in packages of 100 to 200 already signed, and then went so far as to furnish their rubber stamps—which appears on these bills of lading—to this concern so that they could consecutively date these bills of lading to suit. This agent has never been punished although found guilty under the laws of New York. He still runs around free, as well as the man who perpetrated the crime, Mr. Gibson Oliver. This punishment is only a matter of a short time.

I, for this reason, favor the passing of the Pomerene bill, holding the railroad liable, as well as holding the agent liable for their acts. It is a terrible thing in the commercial world to think that you can come down some morning and find you have lost all you have got,

and a good deal more besides, without a basis of recovery, and the Pomerene bill will amply protect us and make business far more easy to protect the people's deposits which are in every bank in the Union, which is really the money they borrow, and ought to be protected. I am strongly in favor of anything that will hold the railroads liable for acts of their agents.

I think that is all, Mr. Chairman.

The CHAIRMAN. Under the law in New York, as I understand it—I may be misinformed—a railroad company is liable, is it not?

Mr. KEUSCH. Yes, sir; they are.

The CHAIRMAN. And what is their particular defense, or what was it in this case?

Mr. KEUSCH. They claimed that we were negligent in not following the matter up in its entirety and finding out this matter sooner, before the crash came.

The CHAIRMAN. They did not disclaim an original liability under the bill of lading on the ground that they had not received the goods?

Mr. KEUSCH. That was one of the specifications—that they had not received the goods.

The CHAIRMAN. In the face of the law of New York?

Mr. KEUSCH. Yes, sir; they did not really have any defense at all. They were merely putting up a defense in order to gain something. They had nothing to lose, you see.

Mr. Chairman, I would like to insert in the record a copy of one of the bills of lading to which I have referred.

The CHAIRMAN. That will be incorporated in the record.

The bill of lading is as follows:

[Uniform bill of lading—Standard form of order bill of lading approved by the Interstate Commerce Commission by order No. 787 of June 27, 1908.]

THE DELAWARE & HUDSON CO.

Shippers No. —.

ORDER BILL OF LADING—ORIGINAL.

Agents No. —.

Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, at Albany, N. Y., January 14, 1910, from D. & E. Co. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

The rate of freight from ——— to ——— is in cents per 100 pounds.

If — times first.	If first class.	If second class.	If rule 23.	If third class.	If rule 26.	If rule 28.	If fourth class.	If fifth class.	If sixth class.	If special per —.	If special per —.

(Mail address—Not for purposes of delivery.)

Consigned to order of Durant & Elmore Co.

Destination, New York City. Lighterage free.

Notify Otto Kensch. Not graded.

At New York City, State of ———, county of ———.

Route, ———. Car initial, ———. Car No. ———.

No. packages.	Description of articles and special marks.	Weight (subject to correction).	Class or rate.	Check column.	If charges are to be prepaid, write or stamp here, "To be prepaid." Prepaid.
	10 cars corn:				Received \$—— to apply in prepayment of the charges on the property described hereon.
	4032 to E 108097.....	56,000			
	83254.....	do			
	83356.....	do			
	82195.....	do			
	82020.....	do			
	84140.....	do			Agent or cashier.
	83937.....	do			Per.....
	72690.....	do			(The signature here acknowledges only the amount paid.
	77660.....	do			Charges advanced: \$.....
	74759.....	do			

(Stamped:) Delivered by Walter B. Pollock, manager.

(Stamped:) The D. & H. Co. freight office, Jan. 14, 1910, Albany, N. Y.

Durant & Elmore Co., shipper. H. R. Palmer, agent.

Per B. Per 100.

(This bill of lading is to be signed by the shipper and agent of the carrier issuing same.)

(Stamped on back:) Deliver to Otto Kensch. Durant & Elmore Co., M. A. Bulger.

CONDITIONS.

SECTION 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after 48 hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

SEC. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market, or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery then, within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

SEC. 4. All property shall be subject to necessary cooperage and bailing at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

SEC. 5. Property not removed by the party entitled to receive it within 48 hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner, and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for use of tracks after the car has been held 48 hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

SEC. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

SEC. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

SEC. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

SEC. 9. Except in case of diversion from rail to water route which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of

lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any and all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including light-erage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of the instrument.

SEC. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Mr. Keusch was thereupon excused.

STATEMENT OF W. M. HOPKINS, REPRESENTING THE CHICAGO BOARD OF TRADE.

Mr. HOPKINS. If the committee please, I appear here for the Chicago Board of Trade to indorse the Pomerene bill as it is proposed to be amended, which amendment will be more fully explained by the attorneys representing the various interests.

We believe the Pomerene bill will give us what we require, that is, an instrument of credit and a bill of lading which carries the full liability of the carrier. We believe the effect of that bill will be to make the carriers, being responsible fully for the property covered by the bill of lading, more careful in the issuing and handling of bills of lading. It is a notorious fact that the bill of lading has no value now, and the looseness in which bills of lading are issued is most astonishing when you consider the losses to be so small as they are now.

For illustration, I have before me a bill of lading drawn by a commission firm of grain merchants in Minneapolis, made out by themselves, signed by the agent, bearing the stamp of the Great Northern Railway Co. The bill of lading says that this shipment was re-consigned from Prescott. Prescott is a station in Wisconsin south of Minneapolis. It also says that the shipment originated north of Minneapolis—two conflicting statements in that bill of lading. If the first statement is true, the rate to be applied to that shipment from Minneapolis to Chicago would be 12½ cents a hundred pounds. If the second statement is true, the rate to be applied would be 7½ cents per hundred pounds, a difference of 5 cents a hundred pounds.

That illustrates the loose manner in which bills of lading are signed by agents. I might multiply those illustrations in the hundreds with respect to bills of lading that come to my notice in the Chicago Board of Trade.

The bill of lading that will be framed under this law will be the order bill of lading, which is—as negotiable as a note, and therefore the railroad company being responsible for the property covered by the bill of lading, will be careful in its issuance, and will surround it with all safeguards, as they do their money received at the stations, or the other valuable property that they handle.

Now, it has been stated here that if this full carrier's liability bill of lading becomes in fact a law, the carriers will be put to very great expense, and therefore should have additional compensation. To

my mind that is a question which this committee will not deal with, for the reason that it is already covered in the interstate act, and the Interstate Commerce Commission has power to determine the reasonableness of the rates, either because of the issuance of a bill of lading or for any service performed by the carrier.

As a matter of fact, we do not believe that any additional expense will be entailed on the part of the carrier, because there has been a law for the past 30 years in the State of Illinois which does impose the obligation upon the carrier of delivering the amount of grain it receives from a country station. The law in effect provides this, that it is the duty of the carrier to weigh the grain tendered it for transportation. If it neglects to do so then it must accept a statement of the shipper's, supported by an affidavit, as to the quantity of grain contained in that car, but it must deliver a like quantity at destination. That has been in operation, as I have said, for 30 years, and I do not know of any hardship that it has ever imposed on the carrier. But it does this: It relieves the shipping public of the necessity of accepting very great losses in transportation of grain, where there is a difference between the country weights and the elevator weights.

The practice of transporting grain is to accept the outturn weights upon which to base the freight charges. Where there is a difference between the outturn weights—which are the hopper scale weights—and the country weights, it is a question then as to which weight is correct. Under this Illinois law the obligation rests upon the carrier to show that that grain has not been lost in transit, and, as a matter of fact, a great many claims are adjusted because this responsibility rests upon the carrier that can not be adjusted on shipments from other States for the reason that the bill of lading carries no obligation to deliver anything more than the car contains at destination. In other words, the bill of lading in general use is in effect the shippers load and count bill of lading of grain except as to grain transported wholly within the State of Illinois. We have never heard any complaint on the part of the railways as to this Illinois law being a hardship, but it does prevent the claim agents of the Illinois companies from denying the right of the consignee to insist upon the amount of the grain that was loaded into the car being delivered, the responsibility for the difference being upon the railroad company.

Therefore we believe that the contention of the carriers as to the additional expense involved is not well founded, as the record of a law carrying this liability or forcing the carrier to accept this liability has not demonstrated such to be the case.

One of the Senators this morning asked a question in respect to the use of bills of lading on transit grain. I wish to say a word with reference to the practice of handling transit grain and the use of bills of lading.

Bills of lading on transit grain are handled precisely the same as they are on grain that reaches a final destination. It is the duty of the carrier under the present bill of lading to demand the surrender of the bill of lading before the property is delivered. This is invariably done, and this is true both as to transit and nontransit shipments.

There is annually received in the Chicago market about 250,000,000 bushels of grain, or approximately 250,000 carloads, a very substantial portion of which is transit grain, that is grain that stops in that market

to be subsequently forwarded on a through rate. Bills of lading are always taken up on this transit grain whenever the grain leaves the possession of the carrier, and when the transit grain is forwarded a new bill of lading is issued. I believe this is the general practice throughout the country, that in all cases where grain leaves the possession of the carrier the bill of lading is first taken up and a new bill of lading issued when a new transaction is begun. So that the misuse of bills of lading is no less or no greater in the case of transit grain or other property than in the case of nontransit shipments.

I would like to put into the record also the importance of the validity of a bill of lading to the small dealer. Of the 250,000 carloads of grain that are received annually at Chicago, about 85 per cent of that grain is consigned to be sold, and therefore shipped by the small country dealer. Usually the country dealer is a man of small means and must use this bill of lading as an instrument of credit to continue his business. To take away from him an instrument which he is using as credit, on which he does his business, would entail a very great hardship on him, and that hardship would not apply with equal force to the large dealer because, as the record has shown, the large dealer's credit is based upon his general financial responsibility rather than the particular bill of lading on any particular car.

Therefore, we would like to impress upon this committee the importance of this measure in protecting the small dealers throughout the country in the handling of the property in which we are most interested and that is grain.

I think that is all I care to say, Mr. Chairman.

There being no further questions, Mr. Hopkins was thereupon excused.

STATEMENT OF CORNELIUS LYNDE, OF THE FIRM OF CASSO-DAY, BUTLER, LAMB & FOSTER, LAWYERS, CHICAGO, ILL.

Mr. LYNDE. Mr. Chairman and gentlemen, I appear here as the accredited representative of the Chicago Association of Commerce. I am a member of the legislation committee of that association, which is an incorporated association with a membership of approximately 4,000 members in the city of Chicago, and very many more outside of that city, representing banks and railroads and shippers, and every variety of business interest in that city.

I may say that at the meeting at which we considered this legislation a resolution was adopted which I desire to read. There were present representatives of all the different interests which are affected by this legislation. The legislation committee adopted resolutions which were approved by the executive committee of the association, as follows:

The legislation committee, owing to the short time which it has had to consider these measures, is not as fully advised as it would desire to be before reporting on them, which is largely due to the failure of the banking interests to keep us posted as to the situation; but the committee feels that, in view of the emergency evidently existing, it is proper that it should make the following recommendation, which is put in the form of a resolution:

Be it resolved, That the Chicago Association of Commerce recommend the enactment into law by the Congress of the United States of the general principles set forth in Senate bill 4713, being the bill introduced by Senator Pomerene, entitled, "A bill relating to bills of lading in commerce with foreign nations and among the several States," now being considered

Be it further resolved, That the Chicago Association of Commerce is opposed to any amendment to this measure or any similar measure providing for additional compensation to carriers, except in such instances where the issuance of such bills of lading plainly require the rendering of additional services by such common carrier.

Be it further resolved, That the Chicago Association of Commerce is in favor, in so far as is practicable, of extending the jurisdiction of the Interstate Commerce Commission, if necessary, so that such commission may have express power to determine details as to form or manner of issuance of bills of lading.

That is the position of the Chicago Association of Commerce in this matter. We favor the enactment of the Pomerene bill, subject to certain amendments which I intend to take up in detail.

Those amendments were the amendments which were agreed upon at the conference referred to at the last hearing—the conference of the shippers' representatives. The first amendment that we desire is the striking out of section 3 of the subsection "b." That section provides at follows:

That a carrier may insert in a bill issued by him any other terms and conditions: *Provided*, That such terms and conditions shall not—

(a) be contrary to law or public policy; or

(b) in anywise impair his obligation to exercise at least that degree of care in the transportation and safe-keeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

It is the opinion of the shippers that that section may impinge upon the carrier's liability. It is true that the section is a limitation upon the right of the carrier to limit his liability, but in view of the Carmack amendment in the interstate commerce act, and in view of the settled law on the subject in the Federal courts, we feel that the enactment of that into the law might cast a doubt upon the existing law upon the subject, and we feel that it would be better to leave that out, particularly in view of the fact that subsection "a" of section 3 provides that the terms and conditions shall not be contrary to law or public policy.

The law on this subject in the States is in a very conflicting condition. This bill was prepared by the uniform commissioners to be enacted in the various States, and it was obvious that some provision covering this subject should be incorporated in the bill, but as there was no such conflict in the Federal decisions there seems to be no necessity for it, and for that reason we respectfully submit that that should be omitted.

The next amendment we want is an amendment to section 2,3 which has already been read.

Section 23 is the really important section of the Pomerene bill. It provides specifically the liability of the carrier, particularly for the statements of its agent. The last part of section 23, which is on page 11 of the Senate copy of the bill, provides that—

the carrier may also, by inserting in the bill the words "shipper's load and count" or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill.

This is the provision under which a "shipper's load and count" bill of lading may be issued. There is nothing in this section nor in any other section in the bill which specifically determines whether the carrier or the shipper has the right to prescribe the form of the bill of lading. Under this law, as it is drafted, the question is open to conflict as to whether the carrier or the shipper could insist upon a clean

bill of lading, so called. I think probably it would determine that if the shipper complied with the railroad conditions, then the carrier would have to issue the full liability bill of lading. But there is doubt, inasmuch as the law does not have any specific provision of that kind.

Furthermore, there are many instances in transportation where the shippers make out the bill of lading. The ordinary loading of a car on team tracks or industry tracks is usually done by the shipper making out the bill of lading, or if that is not the case the shipper loads the car.

The amendment which we have suggested adds to the words that I have read the following provision:

But if the carrier verifies the statement of property so loaded, or refuses so to do upon demand of the shipper, he shall not insert the words "shipper's load and count" or other words of like purport in such bill of lading.

This leaves it to the carrier to determine whether or not he will accept the shipper's statement. The carrier has to have the demand made upon him to issue the full liability bill when the bill of lading is presented, and when the car has presumably been loaded by the shipper. If the carrier chooses to issue that bill of lading without making an investigation or without counting the contents of the car, the carrier has the right to assume that responsibility. On the other hand, if the carrier does not desire so to do, his rights are protected by an opportunity for examination. In other words, the ascertainment as to whether the shipper's bill is correct. It seems to me that that provision safeguards the rights of both parties, but makes the law specific in a manner in which it is not now specific.

There is a further amendment which we would like to have made to section 27, page 13, of the Senate draft. This section provides:

SEC. 27. That after goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be negotiable.

This is intended to cover the situation when the carrier has lawfully parted with the possession of the goods and the bill is still outstanding. It is obvious that under certain circumstances the carrier can not maintain possession of the goods if the goods are perishable and the consignee never comes to take up the bill or present the bill. Obviously it is the duty of the carrier to take care of the goods and extract such salvage as he can from the situation. This, it seems to me, is probably sufficient on its face, but we think by inserting after the word "goods" on line 4 the word "themselves" the purport of the section would be more specific. In other words, all this would do would be to provide that the carrier should not be liable for failure to deliver the original goods actually described by the bill of lading under the other circumstances and conditions which are described in the section.

I have simply one more thing that I want to lay emphasis upon, and that is the suggestion which has been made by the railroad counsel here, that some amendment should be put in this bill, or in any bill that is passed upon this subject, providing for additional compensation in instances where the full liability bill is issued.

The interstate commerce act gives to the Interstate Commerce Commission, under the provisions of section 1, jurisdiction over the form

and issuance and substance of bills of lading. The uniform bill of lading, which is the bill generally used, is published in the different classifications, in the official classification territory, and in western classification territory. The terms and provisions of that bill were agreed upon at a time when the Interstate Commerce Commission did not have jurisdiction of this subject matter. The commission caused a conference to be held, and by mutual concessions this bill was adopted as the one, which was the only result that could be obtained from that conference. It did not meet the demands of the shippers, and, as has been indicated here, it does not cover all the causes for complaint that have arisen; but it is published in the tariff.

In other words, it is subject to the jurisdiction of the Interstate Commerce Commission as the law now stands. That is one thing. Then Congress by adding the Carmack amendment has specified the liability of the carrier. The commission has jurisdiction over the subject of rates; full jurisdiction over that subject. There may be instances where the necessity of the carrier to go away from its station to a sidetrack, for instance, to examine a car which is loaded by a shipper would entail an additional service for which compensation should be had. In that case it would be perfectly proper for the carrier to insert a provision in the tariff which would cover such service, and that matter would be subject to complaint before the Interstate Commerce Commission, and subject to investigation by that commission, and each individual question of fact could be considered by the tribunal which has been especially designed for such purpose.

But if Congress inserts in this bill of lading legislation a provision to the effect that the carrier is entitled to additional compensation, it amounts to Congress prejudging the question of fact before it has arisen and before it is presented, and it seems to me that is obviously improper, particularly in view of the policy as indicated by the interstate-commerce act.

The CHAIRMAN. You are familiar with the decision of the Supreme Court on this subject, are you not?

Mr. LYNDE. The Friedlander decision?

The CHAIRMAN. Yes.

Mr. LYNDE. Yes, sir.

The CHAIRMAN. If the court had held there that the companies were liable, as the shippers contended, would or would not that have cured this situation?

Mr. LYNDE. I do not think that it would have cured a good many of the questions that have arisen.

The CHAIRMAN. What additional legislation would you want beyond the declaration that the carrier was liable for the statements of the agent?

Mr. LYNDE. In the first place, it seems to me there is this situation: There is no common law in the Federal courts; it is very largely a matter of statute. If this matter is being considered by reason of a contract which is made in a State, then that law may be presumed to have governed, in the absence of Federal legislation, even though the contract covers interstate commerce. But where the laws in the different States are much in conflict, it seems to me that is going to raise questions, and that is going to raise difficulties, some of which have been displayed to this committee. I think, too, that that decision—I am not certain as to the exact date of it, but my recollection

is that it was long prior to this last amendment to the interstate commerce act, and I think that the interstate commerce act has indicated a policy which is inconsistent with leaving matters of that kind to the courts. It seems to me these questions really go to the Interstate Commerce Commission.

The CHAIRMAN. The question of the reasonableness of a rate goes to the Interstate Commerce Commission, but the question of whether the rule in this country should be one of liability or not liability is a purely political question, and settled by Congress, in view of the liability.

Mr. LYNDE. What I am trying to indicate is that it seems to me with the opposition to the existing state of things which has caused the application for this legislation goes beyond the mere liability of the carrier for the so-called unauthorized acts of its agents. There are other things that have brought it about. The question of the use of these bills of lading in foreign commerce, for instance, and the agitation as to the terms of the bill of lading. Those are outside the question which was considered by the Supreme Court in that case. If we are going to have legislation on this subject, I think it is better to adopt a complete codification covering the whole thing, which is uniform with the law being enacted in the various States, than simply to adopt a law for the purpose of curing what comes from a mistaken decision. That attitude is the one which we take in this matter.

The CHAIRMAN. Codification is all right, but the simpler the law could be, of course the better. There has been considerable discussion here already as to the possibility of some constitutional questions being raised here. Now an act of Congress which simply establishes a rule of liability in reverse of that which the court laid down would be free from all questions, free from all difficulty of construction, and unless there is something that would not be reached by that—and that is what I am asking you as to what your views were—

Mr. LYNDE. It seems to me that the facts which have been presented to this committee show states of fact which might not have been reached by the law suggested, the law simply curing the Friedlander decision. I think there are other things which have been suggested here. I am not afraid of the constitutional question, in spite of the criticism that has been made on that point. I think that under the decision of the Supreme Court, for instance, in this last second employers' liability case which has recently been handed down, and the other decisions along that line, Congress has the power to completely legislate on anything which is the subject of interstate commerce. That has been very fully determined. I for one am not afraid of that issue in this law. It seems to me that that is the general view which should have been taken by railroad counsel, as is evidenced, I think, by Col. Thom's answer here.

The CHAIRMAN. I am not prone to magnify constitutional objections. I was just getting your view as to whether if the court had held the reverse of what it held, if that would not have been all sufficient, so far as the question of liability is concerned. There are some questions with reference to uniform form and all of that which have been placed in the hands of the commission, of course.

Mr. LYNDE. As I understand it, the commission has not yet exercised any authority under that section of the interstate commerce act. I am not sure about that, but I understand that is still a question of construction.

The CHAIRMAN. That will be all. I simply wanted to get your views.

There being no further questions, Mr. Lynde was thereupon excused.

STATEMENT OF MR. GEORGE F. MEAD, OF BOSTON, MASS.

The CHAIRMAN. Mr. Mead, please give your name, residence, and business to the reporter.

Mr. MEAD. I represent here to-day the Boston Fruit & Produce Exchange, of Boston, having a membership of 800, and the Boston Chamber of Commerce, having a membership of 5,000, the latter being the largest commercial organization in the country.

The two latter bodies, Mr. Chairman, have authorized me to specifically indorse the so-called Clapp-Stevens bill, because they are familiar with the provisions of that bill, they having been interested in it since its introduction in the Fifty-ninth Congress, and at different times having passed resolutions favoring the legislation contained therein and sending representatives here to indorse the same. They have indorsed that bill, but with no prejudice to the so-called Pomerene bill, because not until my reaching Washington two weeks ago was I aware that that bill was under consideration.

These two bodies being more familiar with the so-called Clapp-Stevens bill, have given it their indorsement, although at the time that the so-called Pomerene bill was before the Massachusetts Legislature for enactment both these bodies appeared in favor of that legislation.

I stated we had indorsed the so-called Clapp-Stevens bill. There is, however, one provision in that bill which is very objectionable to us, and that same objection obtains with the Pomerene bill, namely, the "shipper's load and count" provision.

That, we feel, is an unfair, unjust, unreasonable, and illogical provision. I have been given to understand that the classification rules require that a shipper must load and unload his cars in order to obtain the benefit of carload rates, and that statement, I think, was confirmed at the last hearing by the railroad representatives; but, as a matter of fact, I think there is only one tariff rate filed whether car is loaded by shipper or the railroad.

My special line of business has to do with the shipment of perishable goods. The railroads invariably stamp such bills of lading "Shipper's load and count." We feel that is an illogical thing to do, because having required us to load and unload our goods in order to get the benefit of the carload rates they seek to punish us for having conformed to their rules and to evade their just liability.

We have two amendments to offer, Mr. Chairman, to Senate bill 957, the first relating to the "Shipper's load and count" provision of that bill, to be inserted at the end of section 4. This is the language:

But the carrier, when requested and given reasonable opportunity by the shipper to do so at a station where the carrier has an agent, shall examine and count the contents of any car and shall not insert in the bill of lading issued for the goods therein the words "Shipper's load and count," or other words of like purport.

Also, by striking out in the last paragraph of section 4 the words "by the improper loading of."

In connection with that I would like to have read into the records a copy of a circular issued by the Boston & Maine Railroad, now leased by the New York, New Haven & Hartford Railroad Co., under date of February 21, to this effect:

Athy. No. 1714-300.]

[Circular T. B. F. No. 195.

BOSTON AND MAINE RAILROAD. MAINE CENTRAL RAILROAD CO.

FREIGHT TRAFFIC DEPARTMENT, TARIFF BUREAU,
Boston, Mass., February 21, 1912.

TO AGENTS:

You are hereby notified that shippers who load carload package freight on public team tracks, at other than flag stations, are entitled to a clear bill of lading (without notation as to "shippers' count," "more or less," etc.) for the number of packages loaded, provided that, before commencing to load such freight the shipper notifies this company's agent, or his representative, that a clear receipt will be required.

Be governed accordingly.

W. K. SANDERSON,
General Freight Agent M. C. R. R., Portland, Me.

G. H. EATON,
General Freight Agent B. & M. R. R., Boston, Mass.

Issued by F. S. DAVIS,
Chief of Tariff Bureau, Boston, Mass.

That seems to be right in keeping with the spirit of amendment I have just offered, showing that the railroads recognize the justice of a claim of that kind.

Mr. Chairman, in view of the fact that whatever testimony I might give further would be simply cumulative; I won't take more of your time, except that we hope this committee will report a bill that will see to it that the "shipper's load and count" provision is cured by some such amendment as I have offered, which amendment we consider fair both to the railroads and to the shippers.

The CHAIRMAN. That is just what I want to discuss with you for a moment. What I say is not in criticism of your intention at all but is simply a desire to get information. You say:

But the carrier, when requested and given reasonable opportunity by the shipper to do so at a station where the carrier has an agent, shall examine and count the contents of any car, and shall not insert in the bill of lading issued for the goods therein the words "Shipper's load and count."

Now, of course, one object of this is to get a law here, if we get anything, that will be just as free from doubt as to what it means and as free from any difficulty of enforcement as possible.

Mr. MEAD. Yes, sir.

The CHAIRMAN. If a bill of lading under this amendment should bear the words "shipper's load and count," this would leave it open to an inquiry and investigation by the courts as to whether or not the carrier had been requested and given the opportunity, would it not?

Mr. MEAD. It might.

The CHAIRMAN. Would not that lead to a great deal of litigation that would be difficult?

Mr. MEAD. It might. That amendment was adopted after a conference with Prof. Williston, Mr. Paton, and Mr. Ives, of the Boston Chamber of Commerce. We were anxious in the preparation of it to be fair to the railroad companies, and only asked them to examine

and count when requested, and a reasonable opportunity given them to do so. We felt it should not apply to a nonagency station or to spur tracks running into fields where cars were loaded. It might be open to the criticism you have suggested.

The CHAIRMAN. You would contemplate, I take it—at least I ask you that—that under this amendment, if the bill of lading bore the words “Shipper’s load and count,” that the carrier had been requested and given a reasonable opportunity by the shippers, that then the carrier should be liable as though the words “Shipper’s load and count” were not in the bill of lading?

Mr. MEAD. You mean that would put the proof upon the shipper that he had given them opportunity to do so?

The CHAIRMAN. No. I mean if a bill of lading with this amendment in the law was issued bearing the words “Shipper’s load and count” and in fact the carrier had been requested and had been given an opportunity to count the contents, that then the carrier would be liable, notwithstanding the words “Shipper’s load and count” were in the bill.

Mr. MEAD. Yes, sir.

The CHAIRMAN. That would at once throw the door open, would it not, to an interminable amount of litigation, although the bill of lading bore the legend “Shipper’s load and count,” as to whether or not there had been, in fact, an opportunity given and a request made to the carrier to verify the count?

Mr. MEAD. It might; yes, sir.

The CHAIRMAN. Under the existing law as interpreted by the Supreme Court the carrier issues its bill of lading and if, as a matter of fact, the goods were not put in the car, the carrier is not liable. Now to avoid that and to avoid the litigation, it is desired to pass a law which will fix their liability absolutely, and, of course, one of the objects of that is to render certain the bill of lading which has been put out, so that everybody can rely upon it.

Now, does it not seem to you that if it is going to be permitted to put “Shipper’s load and count” into a bill of lading where it can only be accepted by the shipper—certainly it would never be inserted if it were not true, because the shipper would want his bill of lading to have the greatest possible credit—that whatever injury might result would be less than that which would result from bringing a new question into litigation as to whether or not back of this recital in the bill of lading was the fact that the shipper had notified the carrier, and the carrier had had an opportunity to verify the count?

Mr. MEAD. That would depend to a certain extent on the attitude of the railroad and how they were willing to construe the amendment and work in accordance with it. If they wanted to set up a claim under that amendment and have a disputed question whether they had been given an opportunity, it would no doubt make litigation.

The CHAIRMAN. No, they would not set it up. They would have a bill of lading which on the face of it relieved them by the words “Shipper’s load and count.” That would be an uncertain statement, if that is put out, and subject to the same uncertainty as the bill of lading is to-day, because, notwithstanding that assertion, which lessens their liability, the fact might be proved which would increase their liability.

I simply suggest that because, if we do anything, we want to make it certain.

Mr. MEAD. You think that might introduce a new uncertainty into it, instead of making it clear?

The CHAIRMAN. Yes. But do not understand me as saying that it would not be adopted if we adopted a bill. But one thing we want to do if we do anything is to get a law here that will relieve these uncertainties, and I simply suggest that to you.

Mr. MEAD. We do not want to introduce anything that will increase the uncertainties. Personally I wish to indorse the amendments offered by Mr. Scales upon behalf of the National League of Commission Merchants.

There being no further questions, Mr. Mead was thereupon excused.

STATEMENT OF MR. W. N. HOPKINS, MANAGER OF THE TRANSPORTATION DEPARTMENT OF THE BOARD OF TRADE, CHICAGO, ILL.

Mr. HOPKINS. May I suggest, in answer to your question, Mr. Chairman, that there are certain circumstances where a shipper would desire to accept a bill of lading "Shipper's load and count?"

The CHAIRMAN. That is what I want to get at. Under what circumstances would a shipper desire a bill of lading that discredited itself as a basis of credit?

Mr. HOPKINS. Let us assume that there is a flouring mill located——

The CHAIRMAN. I do not say that there could not be.

Mr. HOPKINS. I have this illustration in mind. It represents an actual situation. A flouring mill is away from a station about a mile; a country station. There is one agent at that country station. Now, if the miller has to wait until that agent can go down to his mill to check the flour loaded into the car it is going to be a very great inconvenience to him.

The CHAIRMAN. Yes.

Mr. HOPKINS. He would rather accept the hazard in that case of a bill of lading "Shipper's load and count" rather than wait for the railroad agent to come down at the time he is ready to load his flour.

That will illustrate the case where the shipper would prefer to carry his own hazard as to the accuracy of his count.

In the other case, where a clean bill of lading with the carrier's full liability is acquired, it seems to me that no confusion could arise, as was suggested by your inquiry, from the fact that if the shipper desired and demanded a verification of his count, he would not accept any other bill of lading.

The CHAIRMAN. That is just the point. That is what I have been at since this question first came up some time ago. That no shipper would take a bill of lading bearing the legend "Shipper's load and count" unless it was true that it was the shipper's load and count.

Mr. HOPKINS. Unless he elected to do so.

The CHAIRMAN. Then it would be true, of course.

Mr. HOPKINS. So that it seems to me if this amendment which Mr. Lynde suggested to the Pomerene bill goes into effect pertaining to "Shipper's load and count," that no confusion would ever arise as to

whether or not a demand was made upon a railroad company for a clean bill of lading, because the shipper, as I say, would not accept a bill of lading with that notification on it.

The CHAIRMAN. Well, then, what application would that amendment have?

Mr. HOPKINS. The application of that amendment would be to such a shipper as would be willing to accept a "Shipper's load and count" bill of lading.

The CHAIRMAN. Well, but if he accepted a "Shipper's load and count" legend and as a matter of fact it was the shipper's load and count, then this amendment would have no reference to it?

Mr. HOPKINS. Not to that transaction. It would merely give him the right to accept such a bill of lading if he desired to accept, but if he did not desire to accept it, then the law provides that the carrier must give him a clean bill of lading.

The CHAIRMAN. That is another question. But here is an amendment that proposes to put forth a bill of lading with these words, whereas, as a matter of fact, if the gentlemen understood it as I do, back of that legend might be the fact that the shipper had requested and given an opportunity.

Mr. HOPKINS. Yes; if he has done that, then the obligation rests upon the carrier to furnish that bill of lading.

The CHAIRMAN. But supposing he still puts it "Shipper's load and count," and that paper goes out into the world backed by that element of uncertainty?

Mr. HOPKINS. That paper would not go out, because the shipper would not accept it.

Mr. FAULKNER. Then you don't need it?

Mr. HOPKINS. Yes; we need that law, so that the shipper may get a document that represents the property that he has loaded into the car or which has been loaded into the car and has been checked by the carrier. That represents the precise amount of property that has been delivered to the carrier. He has a right to demand that, and he does demand it, and the carrier must give him that, because he won't accept any other instrument.

The CHAIRMAN. But supposing that he does, notwithstanding that, for the sake of convenience, accept an instrument bearing this legend. Would that be a conclusive statement against the shipper under this amendment?

Mr. HOPKINS. I should say yes.

The CHAIRMAN. Then it ought to be made plainer, it seems to me.

Mr. HOPKINS. It seems to me that that is true, so far as knowing that under the law he can require a clean bill of lading.

The CHAIRMAN. I think we both have the same idea of the final result.

Mr. LYNDE. May I make just one suggestion? The point that we have in mind in the amendment is simply to give the shipper the right to insist upon a clean bill of lading. There is nothing in section 23 which gives him that right. It is left uncertain, which form of bill of lading he gets. We provide by the amendment that if the carrier is given a reasonable opportunity to examine the shipment, the shipper shall have the lawful right to insist upon a clean bill of lading.

Mr. FAULKNER. Is not that the law to-day?

Mr. LYNDE. I am not sure that it is.

The CHAIRMAN. We do not want to get into any argument here. You may complete your statement, Mr. Lynde.

Mr. LYNDE. I was merely going to reply that as a practical proposition, where there is nothing specific in the law, the railroads can practically compel the shipper in many instances to take "the shipper's load and count" bill. I can show the records before the Interstate Commerce Commission in the recent wool-investigation case where that was shown to be the fact. I know of my own personal knowledge that is a fact very frequently, although the law may give the shipper the ostensible right.

The CHAIRMAN. That should be corrected undoubtedly, but what I was getting at was, once a bill is accepted and goes out, the very purpose of all this agitation is to give a certainty to that bill in its recital.

Mr. HOPKINS. If the shipper accepts the "shipper's load and count" bill—

Mr. JAMES. I think the situation could be a little fuller met by adding a section to the law wherein the shipper may require the carrier to make the count.

The CHAIRMAN. I think that would be the better form.

Mr. JAMES. It would be a very short section, because the shipper may still desire to load his own goods, and thus get a less freight rate for the shipment.

STATEMENT OF JOHN C. SCALES, OF THE FIRM OF J. C. & C. R. SCALES, COMMISSION MERCHANTS, OF CHICAGO, ILL., CHAIRMAN REFRIGERATOR CAR LINES COMMITTEE OF THE NATIONAL LEAGUE OF COMMISSION MERCHANTS.

The CHAIRMAN. Give your name, residence, and business, Mr. Scales.

Mr. SCALES. My name is John C. Scales; I am a member of the firm of J. C. & C. R. Scales, commission merchants in fruits and vegetables, 50 and 52 West South Water Street, Chicago, Ill., and I am here representing the National League of Commission Merchants.

Mr. CHAIRMAN. In order to save time I shall confine myself to a few written remarks; but first I wish to say that whichever of these bills is adopted, the Clapp bill or the Pomerene bill, a provision should be inserted to permit the shipper to accept the notation "Shipper's load and count" upon a bill of lading if he so wishes. I think that is highly necessary.

The CHAIRMAN. If he does accept that, what is your view as to that being conclusive?

Mr. SCALES. That should be conclusive evidence that he loaded and counted the car.

The CHAIRMAN. Then I think we all understand one another.

Mr. SCALES. Furthermore, in our investigation of the two bills, which was very short—in point of fact, we did not know that there was a Pomerene bill until a very short time ago—we have arrived at the conclusion that section 27 should have the greatest consideration of your committee.

Speaking for the National League of Commission Merchants, I desire to lay before your honorable committee the objections of the aforementioned organization to the shippers' "load and count" feature of Senate bill 957 and Senate bill 4713.

As we interpret both bills, the first paragraph of section 23, S. 4713, and all of section 4, S. 957, down to the word "*Provided*," are clear and explicit as making it obligatory upon the carrier that the goods must be in possession before issuance of bill of lading. The bill once issued, nonreceipt of or nonpossession of the goods does not remove the carrier's liability. This follows strictly the established custom and rule of trade. No merchant could shirk responsibility or escape liability by setting up that although he or his agent had given a receipt for goods that the goods had never been received and consequently he was not liable. The very form of every receipt for goods (and a bill of lading is a form of receipt), "*Received of*," etc., implies unequivocally that the goods have been received into the possession of the receiptor before issuance of the receipt.

In every business transaction, however small, how important is it that goods be actually received before issuance of receipt therefor. How transcendently important, then, does this become when the receipt (the "to order bill of lading") becomes a negotiable paper.

Therefore, as the first paragraph of section 23, S. 4713, and that part of S. 957 alluded to, both hold the carrier liable for its own default, those parts of both bills are approved.

Taking up the second paragraph of the section (23), S. 4713, we see no objection down to the word "consignor" (line 15). To the rest of the paragraph, and to all of section 4, S. 957, from the word "*Provided*," to the end of the section, we wish most respectfully to enter our objection.

Fundamentally we believe it to be the duty of the carrier to load and unload its freight directly into and from cars on sidetracks as it does to and from platforms and warehouses. The latter is always done, the former only occasionally.

As a rule, outside of platforms and warehouses the carrier forces the work of loading and stowing upon the shipper, thus evading the loading and stowing cost, and by neglecting or refusing to count the contents of the car seeks to escape all responsibility whatsoever.

Now, this part, Mr. Chairman, comes home to the question of shippers' load and count, and the necessity of the shipper being allowed to take such a receipt.

We realize fully that there are many exigencies in trade that must be met; that there are many instances where shippers distant from stations (for example, upon private tracks or upon accommodation sidetracks) would desire the privilege of themselves doing the loading. Of course, in such instances the carrier would not care to load nor easily have supervision over the count, but even in these instances it should be made obligatory upon the carrier to furnish a checker to check in the number of packages when so requested or demanded by the shipper. If, however, the shipper wished to do the loading and waived his right to have the carrier count, then the notation "Shippers load and count" would be justifiable and should, upon straight bills, be permitted.

It can readily be seen that if negotiable bills of lading are to retain their place in the business world as negotiable instruments that nothing must be permitted that would vitiate their integrity.

If a to-order bill of lading states 200 packages in a car, then, for the security of the buyer of the bill and all concerned, that number of packages should be there and it should be made the duty of the

carrier to see that that number was loaded or suffer the consequences. In fine, the carrier should be required in every instance to give a clean bill of lading without the notation "Shippers load and count," except where the shipper willingly, for his own or (if you please) for the accommodation of the carrier, permitted that notation to be put upon the bill.

I notice, Mr. Chairman, that most of the testimony to-day has come from dealers in grain. I come here as representing the perishable food products of the country and consequently view the bill of lading matter from a different standpoint. In my view, as relates to "perishables," the shipper should be permitted to take a bill of lading "Shippers load and count" if he so desires, but not otherwise.

As a summary, an analysis of section 23 of S. 4713 leads to the conclusion that this section (so far as it goes) would adequately meet the requirements of "perishables" under transportation and be equitable and just alike to the carrier and shipper by making the following changes in the section: Insert (line 17) between the words "purport" and "indicate" the words "which words, however, shall not be inserted in the bill without consent of the shipper." Strike out (line 20) the words "by the improper loading or." These words should be stricken out for the reason that if the carrier forces the loading upon the shipper, a service which it should itself perform, the carrier should be held liable the same as though the loading had been done by itself and done improperly. There is another and very strong reason why the carrier should not escape liability under cover of "improper loading" by the shipper, and that is that most of the damage to contents of cars is not occasioned by improper loading, but by reckless, wanton, and unnecessary bumping of cars in making up trains and switching.

For the information of your honorable committee, the National League of Commission Merchants, for which I have the honor to speak, is, as its name implies, a national organization made up of branches located in all the larger and many of the smaller cities of the country. These branches are composed of leading firms in these various cities, and the membership consists of not less than five firms in the smaller cities to over 40 firms in the larger. Those firms are engaged in the shipping, receiving, and distribution of the perishable and semiperishable products of the country. Their business extends over the entire United States and Canada, and many are importers and exporters (especially the latter) to Europe and South America. In fact, they are looking for business wherever American trade can be pushed, and in the interest both of domestic and foreign trade and for the good name of American merchants the world over, these merchants pray your honorable committee that it will never let these two acts, either one or the other, relating to bills of lading now under your consideration go out of your hands until the "to-order bill of lading" is so framed for the security of all as to be as good as a United States bond if it is in the power of human ingenuity to make it so.

We wish further to state that this organization is closely affiliated with the National Industrial Traffic League, the American Bar Association, the American Bankers Association, the Western Fruit Jobbers Association, and the International Apple Shippers' Association, and horticultural and agricultural associations throughout

the country too numerous to mention; and this great number of allied interests is looking to your honorable committee to put the shippers "load and count" feature of whichever bill is finally adopted in such shape as will prevent the carrier from evading a responsibility that is customary and insisted upon in every transaction among business men throughout the business world, and what is of more transcendent importance, make the "to order bill lading" what it aims to be and should be—an absolutely reliable and safe negotiable instrument.

RESOLUTIONS PRESENTED BY MR. SCALES ON BEHALF OF THE NATIONAL LEAGUE OF COMMISSION MERCHANTS.

For brevity confining myself to section 23 of S. 4713 (and the same changes can be made in section 4 of S. 957) I respectfully ask consideration of the following amendments:

Insert (line 17) between the words "purport and indicate," the words "which words however shall not be inserted in the bill without consent of the shipper."

Strike out (line 20) the words "by the improper loading or."

There being no further questions, Mr. Scales was excused.

STATEMENT OF SAMUEL WILLISTON, LAWYER, PROFESSOR OF LAW IN HARVARD UNIVERSITY, COUNSEL ASSOCIATED WITH THOMAS B. PATON FOR THE AMERICAN BANKERS' ASSOCIATION.

Prof. WILLISTON. Mr. Chairman, I shall not attempt to repeat any arguments, and shall speak very briefly in regard to a few matters that have come up in the course of the hearing since I made my original statement.

We have endeavored to come to an agreement, so far as we could, with parties interested to get light from whatever source we could as to what a proposed bill should, in fairness to all interests, contain. It seems to us that the bill should be brief. The longer the bill is the more chance there is for argument that this section or that section is undesirable for one reason or another, or unconstitutional.

In regard to the Pomerene bill, different speakers have from time to time attacked several sections. Section 23; section 27—the definition of value and other matters have been raised which seems to us to make it the part of wisdom to adopt, if possible, as brief a bill as will meet the evil, or the main evil, complained of.

We, therefore, advocate the shorter bill, and we believe that the chairman of the committee is right in saying that that bill could probably be shortened to advantage. The first three sections are in the nature of definitions and requirements of what a bill of lading shall contain. When this bill was originally drafted and introduced into the lower House of Congress, the Interstate Commerce Commission had not then recommended the uniform form of bill of lading which has been working so well for the last two or three years.

It was therefore regarded as important to state the chief requirements of a proper bill of lading. That perhaps might go without speaking at the present time. That would make section 4, as to which most of the discussion in these hearings has hinged, practically

the first section of the bill. Some brief definition of order and straight bill would probably be necessary before that. I should be very loath, however, to see the committee do what the chairman intimated, merely confine itself to reporting a section which would in effect overrule the Friedlander case. There are other evils, and section 5 strikes at a very important evil which has not elicited much argument because the carriers themselves do not contend that the practice of delivering goods without taking up an order bill of lading is a proper one. But nevertheless, it is done from time to time.

The first class of cases that Mr. McDougall testified to was a case of that sort, and when a case of that sort arises in court the carrier never fails to argue that it is not liable because it has delivered the goods to the consignee named in the bill of lading, and sometimes that contention has been upheld. The law is perfectly clear that when an order bill of lading is issued to the order of A, if A has transferred that bill, either as security or by way of sale, prior to the delivery of the goods by the carrier, the carrier is liable to the endorsee of the bill of lading, if it delivers the goods to the original consignee, or to anybody else. But if the carrier, while the original bill of lading is still in the hands of the consignee, delivers the goods to that consignee, the person who is at that moment entitled to the goods, the law is not clear that a subsequent transferee of that bill of lading, after the goods have been delivered to the person then the holder of the bill of lading—the law is not clear that the carrier is liable under those circumstances.

The CHAIRMAN. Although the carrier fails——

Prof. WILLISTON. To take up the bill of lading. Simply for the record, I will cite two or three cases:

Schlesinger v. The West Shore Railroad Co. (88 Illinois Appeals, 273, at page 276); *The Anchor Mills Co. v. The Burlington Railroad* (102 Iowa, 262); *The National Commercial Bank v. Lackawanna Co.* (59 New York Appellate Division, affirmed without opinion, 172 N. Y., 596).

The CHAIRMAN. Do you mean that they throw doubt upon it?

Prof. WILLISTON. Those cases which I have cited are cases where the railroad was protected. There are more cases where the carrier was held liable, and the weight of authority is distinctly that way.

The CHAIRMAN. Yes.

Prof. WILLISTON. But the matter is open to grave doubt, and in every litigation where the question comes up, it is raised and bitterly fought. Therefore it seems to us that section 5, as drawn here, ought to be in the bill, for very serious frauds have arisen in this way.

The CHAIRMAN. I had not supposed that question was so much in doubt as you have seemed to indicate. If it is, it certainly should be settled.

Mr. FAULKNER. How would the uniform bill of lading protect the holder of that original order bill?

Prof. WILLISTON. Substantially as section 5——

Mr. FAULKNER. In other words it is the same—makes them liable if they deliver the goods without the taking up of the order bill?

Prof. WILLISTON. Exactly. It is sometimes, and frequently, supposed by business men generally that a provision in the order bill which expressly provides for the surrender of the document, takes care of this question completely, but the trouble with that is that

the railroad invariably says that is a contract between the shipper and the carrier. It is not a contract negotiable, entitling a purchaser who purchased after the bill of lading has been satisfied by the delivery of the goods to the consignee to make any claim. If section 5 goes in, section 6 ought to go in in fairness to the carriers, for that is a limitation to section 5. Section 7, which relates to alterations, was originally prepared to meet a decision of the highest court of Maryland, which held that a fraudulently altered bill was void. Now this makes the bill a good bill, according to its original tenor. It of course makes the alteration void instead of the bill void. It seems to us that that is a brief and desirable section, and that it sets at rest a question that has at least been doubtful enough to mislead a court of high standing, although I think that decision was a narrow one.

There are certain amendments which have been more or less discussed by the various parties interested here. Mr. Page, of the Merchants' Association of New York, asked me to present these amendments. One or two of them have been alluded to before. The first two of them relate to the point made by Mr. Page in regard to bills in sets used in foreign commerce. As the Stephens bill came up from the House of Representatives to the Senate, all allusion to foreign commerce was stricken from the act, and in the bill as introduced in the Senate by the chairman of this committee the form of the Stephens bill in this respect was followed. The reason was that Mr. Page had raised the same point in the House, and the House committee, not seeing otherwise how to deal with the matter, had stricken out foreign commerce altogether. That is an undesirable thing to do, because many bills from inland points are through bills to foreign points, and those bills are not issued in sets. The cotton bills especially are issued in this way from interior points to foreign ports. It is only what are called port bills that are issued in sets.

Now, it seems a pity not to cover in this bill these bills originating in the interior and going to foreign ports. Consequently, these amendments are drawn with a view to making the bill include such bills of lading as I have alluded to, and yet not interfering with the practice of port bills being issued in sets.

The amendment that is numbered 3 has already been alluded to, and it seems to me that Mr. James's suggestion that this be made the subject matter of a separate section is a wise one. The object of the provision, of course, is, as previous speakers have pointed out, to give the shipper a right against the carrier to demand a certain form of bill, not to make any provision as to the effect of such bill if negotiated after the shipper had improperly marked it "shipper's load and count."

The amendment numbered 4 has already been alluded to by another speaker, and therefore it is not necessary for me to say anything in regard to that.

I want to say in closing just a brief word about the existing law. There has been such extended argument on the part of the carriers in regard to the Federal law that it would be natural supposition that the Federal law on this point governed an interstate-commerce transaction. That statement was indeed positively made by the attorneys for the Louisville & Nashville Railroad. Nothing can be

further from the truth. The actual situation is that it depends on what court you go into.

In *Shaw v. The Railroad Company* (101 U. S., 557) the Supreme Court referred to and construed State statutes relating to bills of lading and applied them to an interstate transaction. In *Pennsylvania Railroad v. Hughes* (191 U. S., 477) the court held valid, as to an interstate shipment, a Pennsylvania statute which forbade the limitation of liability by agreement in a bill of lading—that is an agreed valuation.

Mr. Justice Day, on page 491, says:

The principle recognized is that in the absence of congressional action upon the subject, a State may require a common carrier, although in the execution of a contract for interstate carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties. We can see no difference in the application of the principle based upon the manner in which the State requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the State courts.

The situation then as to the Friedlander case is that in a majority of the States where the question is now settled, the law is that the carrier is liable—a very considerable majority, including the States which have imposed that liability by statute. To the States which were alluded to in my original argument, I wish to add that probably Georgia and South Carolina have the same rule.

The *Louisville & Nashville Railroad v. Pferdmenger* (68 South-eastern Reporter, 617) and *Thomas v. The Atlantic Coast Line* (64 Southeastern Reporter, 22).

The situation is, of course, very unsatisfactory, for not only is there sparring as to removal of causes to Federal courts, as was testified to by Mr. Droste in the case he was interested in, but also even a court like New York which has the rule of liability for which we contend, may feel bound to apply the law of another State where the shipment takes place, and where the contract was made if that law is different from New York. So very difficult questions of conflict of laws arise, in addition to the lack of uniformity.

That is the substance of what I have to say.

I would like to have the privilege of inserting at this point this statement of the law.

The CHAIRMAN. That will be incorporated in the record.

The statement is as follows:

RESPONSIBILITY OF CARRIER ON FALSE BILLS OF LADING SIGNED BY AGENT.

Contrary to the doctrine of the Supreme Court of the United States as reported in *Friedlander v. Texas & Pacific Railway Co.* (130 U. S., 416), the courts in New York, Pennsylvania, and other leading commercial States have uniformly held the carrier liable to the bona fide holder of a bill of lading signed by a freight agent without receipt of the goods.

It is common knowledge that the railroads have not been injured but have thrived under this rule of responsibility for agents.

The decisions from New York, Pennsylvania, and Kansas, cited below, are typical.

[New York Court of Appeals. *Bank of Batavia, respondent, v. The New York, Lake Erie & Western Railroad Co., appellant* (106 N. Y., 195). Decided in 1887.]

This action was brought to recover damages alleged to have been sustained by plaintiff bank in consequence of the wrongful issue by defendant railroad, through its local freight agent at Batavia, of two bills of lading. The recital in one was as follows: "Received from F. C. Williams the following articles (contents unknown)

in apparent good order, viz., thirty-five barrels of beans." The recital in the other was the same, save that the articles described were "thirty barrels of beans." No beans were received, and the bills were false. The bank advanced money to Williams on his draft, secured by the bills of lading. Judgment for plaintiff affirmed.

The material facts are stated in the opinion.

PRINCIPAL ESTOPPED FROM DENYING TRUTH OF AGENT'S REPRESENTATION.

Finch, J. It is a settled doctrine of the law of agency in this State that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. (*North River Bank v. Aymar*, 3 Hill, 262; *Griswold v. Haven*, 25 N. Y., 595, 601; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 id., 30; *Armour v. M. C. R. R. Co.*, 65 id., 111.) A discussion of that doctrine is no longer needed or permissible in this court, since it has survived an inquiry of the most-exhaustive character, and an assault remarkable for its persistence and vigor. If there be any exception to the rule within our jurisdiction it arises in the case of municipal corporations whose structure and functions are sometimes claimed to justify a more restricted liability. The application of this rule to the case at bar has determined it in favor of the plaintiffs, and we approve of that conclusion.

FACTS OF CASE.

One Weiss was the local freight agent of the defendant corporation at Batavia, whose duty and authority it was to receive and forward freight over the defendant's road, giving a bill of lading therefor specifying the terms of the shipment, but having no right to issue such bills except upon the actual receipt of the property for transportation. He issued bills of lading for 65 barrels of beans to one Williams, describing them as received to be forwarded to one Comstock, as consignee, but adding with reference to the packages that their contents were unknown. Williams drew a draft on the consignee, and procured the money upon it of the plaintiff by transferring the bills of lading to secure its ultimate payment. It turned out that no barrels of beans were shipped by Williams, or delivered to the defendant, and the bills of lading were the product of a conspiracy between him and Weiss to defraud the plaintiff or such others as could be induced to advance their money upon the faith of the false bills.

NO PRIVILEGE NEEDED TO MAKE ESTOPPEL AVAILABLE.

It is proper to consider only that part of the learned and very able argument of the appellant's counsel which questions the application of the doctrine above stated to the facts presented. So much of it as rests upon the ground that no privilege existed between the defendant and the bank may be dismissed with the observation that no privilege is needed to make the estoppel available other than that which flows from the wrongful act and the consequent injury. (*N. Y. & N. H. R. R. Co. v. Schuyler*, supra.)

CARRIER KNOWS BILL TRANSFERABLE AND ESTOPPED WITHOUT REFERENCE TO NEGOTIABILITY.

While bills of lading are not negotiable in the sense applicable to commercial paper, they are very commonly transferred as security for loans and discounts, and carry with them the ownership, either general or special, of the property which they describe. It is the natural and necessary expectation of the carrier issuing them that they will pass freely from one to another and advances be made upon their faith, and the carrier has no right to believe, and never does believe, that their office and effect is limited to the person to whom they are first and directly issued. On the contrary, he is bound by law to recognize the validity of transfers and to deliver the property only upon the production and cancellation of the bill of lading.

If he desires to limit his responsibility to a delivery to the named consignee alone, he must stamp his bills as "nonnegotiable;" and where he does not do that he must be understood to intend a possible transfer of the bills and to affect the action of such transferees. In such a case the facts go far beyond the instances cited, in which an estoppel has been denied because the representations were not made to the party injured. (*Mayenborg v. Haynes*, 50 N. Y., 675; *Maguire v. Selden*, 103 N. Y., 642.)

Those were cases in which the representations were made not intended and could not be expected to influence the persons who relied upon them, and their knowledge of them was described as purely accidental and not anticipated. Here they were of a totally different character. The bills were made for the precise purpose, so far as the agent and Williams were concerned, of deceiving the bank by their representations, and every bill issued not stamped was issued with the expectation of the principal that it would be transferred and used in the ordinary channels of business, and be relied upon as evidence of ownership or security for advances. Those thus trusting to it and affected by it, are not accidentally injured, but have done what they who issued the bill had every reason to expect. Considerations of this character provide the basis of an equitable estoppel, without reference to negotiability or directness of representation.

FACT OF RECEIPT OF GOODS PECULIARLY IN KNOWLEDGE OF AGENT AND TRANSFEREE
CAN NOT KNOW.

It is obvious, also, upon the case as presented, that the fact or condition essential to the authority of the agent to issue the bills of lading was one unknown to the bank and peculiarly within the knowledge of the agent and his principal. If the rule compelled the transferee to incur the peril of the existence or absence of the essential fact, it would practically end the large volume of business founded upon transfers of bills of lading. Of whom shall the lender inquire, and how ascertain the fact? Naturally he would go to the freight agent, who had already falsely declared in writing that the property had been received. Is he any more authorized to make the verbal representation than the written one? Must the lender get permission to go through the freight house or examine the books? If the property is grain, it may not be easy to identify, and the books, if disclosed, are the work of the same freight agent. It seems very clear that the vital fact of the shipment is one peculiarly within the knowledge of the carrier and his agent, and quite certain to be unknown to the transferee of the bill of lading, except as he relies upon the representation of the freight agent.

The recital in the bills that the contents of the packages were unknown would have left the defendant free from responsibility for a variance in the actual contents from those described in the bill, but is no defense where nothing is shipped and the bill is wholly false. The carrier can not defend one wrong by presuming that if it had not occurred another might have taken its place. The presumption is the other way; that if an actual shipment had been made the property really delivered would have corresponded with the description in the bills.

The facts of the case bring it, therefore, within the rule of estoppel as it is established in this court and justify the decision made.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

[Supreme Court of Pennsylvania. *Brooke v. N. Y., Lake Erie & West. R. R. Co.* (108 Pa., 529).]

FACTS.

Sterrett, J. Defendant is a common carrier corporation, and, at one of its stations in the State of New York, had in its employ P. J. Weiss as shipping clerk, duly authorized to issue bills of lading for goods delivered to the company for shipment over its line. Plaintiffs, as commission merchants in Philadelphia, received, over defendant's road, from F. C. Williams, of Batavia, N. Y., several consignments of barley, on which, from time to time, they made advances, by accepting and paying drafts drawn on them by the consignor and attached to the bills of lading signed by Weiss for and on behalf of defendant. All the bills of lading except one represented actual consignments of barley; but that one was fictitious, having been fraudulently issued by Weiss and delivered to Williams for a carload of barley never delivered to defendant nor shipped to plaintiffs. These facts were, of course, well known to both Weiss and Williams, who conspired to commit the fraud of which plaintiffs were wholly ignorant. Williams made a draft on plaintiffs and attached it to the fraudulent bill of lading. The draft was duly presented, and, on the faith of the bill of lading, was paid by plaintiffs; but, of course, the pretended carload of barley never arrived. Plaintiffs, who thus became the innocent victims of the fraud to the extent of several hundred dollars, claim that defendant, through whose shipping agent they were defrauded, should make good the loss.

CARRIER ESTOPPED FROM DENYING ASSERTION OF ACCREDITED SHIPPING AGENT.

The claim appears to be both reasonable and just; and, notwithstanding the authorities cited in support of the opposite view, we are satisfied it is so. Under the circumstances cited in the case stated defendant is estopped from denying what its accredited shipping agent asserted in the bill of lading by which plaintiffs, without any fault on their part, were misled to their injury * * *.

PRINCIPAL BOUND BY ACTS OF AGENT WITHIN SCOPE OF AUTHORITY HELD OUT TO WORLD TO POSSESS.

It is contended that inasmuch as no authority, real or apparent, to issue bills of lading without receiving the goods mentioned therein, had actually been given by the railroad company to Weiss, it was not in any manner responsible for his unauthorized act, even as to innocent third parties, who were misled and injured thereby. We can not assent to this proposition. As between principal and third parties, the true limit of the agent's authority to bind the former is the apparent authority with which the agent is invested; but, as between the principal and the agent, the true limit is the express authority or instruction given to the agent: *Evans' Agency*, 594, 606; *Adams Express Co. v. Schlessinger*, 25 P. F. Smith, 246. The principal is bound by all the acts of his agent within the scope of the authority which he held him out to the world to possess, notwithstanding the agent acted contrary to instructions; and this is especially the case with officers and agents of corporations. Since a corporation acts only through agents it is bound by its agents' contracts when made ostensibly within the range of their office. One who authorizes another to act for him in a certain class of contracts undertakes for the absence of fraud in the agent acting within the scope of his authority: *Whart. Cont. secs. 96, 130, 269*. The authority of an agent to act for and bind his principal will be implied from the accustomed performance by the agent of acts of the same general character for the principal with his knowledge and consent: *Evans' Agency*, 193, note. These elementary principles are founded on the doctrine that where one of two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and as having authority in that matter, should be bound by it: *Evans' Agency*, 591. It is conceded in this case that the company did not authorize the issuance of bills of lading without receipt of the goods, but it put Weiss in its place to do that class of acts, and it should be answerable for the manner in which he conducted himself within the range of his agency. Public policy, as well as the ultimate good of corporations themselves, requires that this should be the rule.

[*Supreme Court of Kansas. Wichita Sav. Bank v. Atchison, Topeka & Santa Fe R. R. Co.* (20 Kan., 519). Decided in 1878.]

At the instance of a shipper, the freight agent issued two original order bills of lading for the same shipment of wheat, the shipper stating that he wished the additional bill of lading to file as a record in his office. The shipper negotiated one of the bills of lading for value to W., to whom the wheat was delivered. He borrowed money from plaintiff bank on security of the other bill of lading and then absconded.

Held: The railroad company is estopped to deny the receipts of the goods and is liable to the bank.

RESPONSIBILITY FOR AGENTS A NECESSITY TO SMALL SHIPPER.

Horton, C. J. * * * Our State is a great producer of grain, large amounts of which seek markets outside of its boundaries. The means of its transportation are mainly limited to railroads, and commercial transactions by grain dealers extend to millions each year. The great mass of these products, when started to eastern markets, are purchased and paid for through bills of lading. The custom of grain dealers is to buy of the producer his wheat, corn, barley, etc., then deliver the same to a railroad company for shipment to market. The railroad company issues to the shipper its bill of lading. The shipper takes his bill of lading to a bank, draws a draft upon his commission merchant, or consignee, against the shipment, and attaches his bill of lading to the draft. Upon the faith of the bill of lading, and without further inquiry, the bank cashes the draft and the money is thus obtained to pay for the grain purchased, or repurchase other shipments. In this way the dealer realizes at once the greater value of his consignment and need not wait for the returns of the sale of his grain to obtain money to make other purchases. In this way the dealer with a small capital may buy and ship extensively; and while having a capital of a few hundred dollars only, may

buy for cash and ship grain valued at many thousands. This mode of transacting business is greatly advantageous both to the shipper and producer. It gives the shipper who is prudent and posted as to the markets almost unlimited opportunities for the purchase and shipment of grain, and furnishes a cash market for the producer at his own door. It enables the capitalist and banker to obtain fair rates of interest for the money he has to loan and insures him, in the way of bills of lading, excellent security. It also furnishes additional business to railroad companies, as it facilitates and increases shipments of produce to the markets. A mode of business so beneficial to many classes ought to receive the favoring recognition of the law to aid its continuance.

ADDITIONAL STATEMENT OF MR. FRANCIS B. JAMES, OF LITTLEFORD, JAMES, BALLARD, FROST & FOSTER, OF WASHINGTON, D. C., AND CINCINNATI, OHIO.

MR. JAMES. Mr. Chairman, I have been requested to close the discussion on the Pomerene bill by reviewing the whole situation.

MR. FAULKNER. Before Mr. James goes on, if he is going to close, I would like to have the right to make some comments, if necessary, and file them with the committee at as early a day as possible, in reference to these amendments that have been suggested. Some of them I think I can concur in, but most of them I can not.

THE CHAIRMAN. Would it not be better, Mr. James, to postpone your presentation until after Senator Faulkner has made his statement? Then you can put in a brief to cover the whole matter.

MR. JAMES. I am going to do that, Mr. Chairman, but there are matters to which I had better call attention orally.

Although Prof. Williston drew the Pomerene bill as a uniform State bill as the representative of the Commission on Uniform State Laws in National Conference, yet as counsel for the American Bankers' Association he seeks to cast some doubt on the wisdom of this committee reporting out the Pomerene bill, stating that provisions therein have been criticized. This bill is a perfect measure, and so-called attacks on several of its sections dissolve in thin air when carefully analyzed.

It has been suggested that paragraph (b) of section 3 be omitted. This is no criticism, because paragraph (b) is a mere illustration of paragraph (a), and declaratory of the Federal law as stated by the Interstate Commerce Commission in the matter of released rates (May 14, 1908), 13 I. C. C. R., 550. It is immaterial, therefore, whether paragraph (b) be retained or omitted, and therefore the suggestion to strike out paragraph (b) is no criticism of the Pomerene bill.

The suggestion is made to add a proviso at the end of section 23. This suggested proviso is in no manner a criticism of the Pomerene bill, but will cover an entirely new subject matter, to wit, the duty of a carrier to count. Being an entirely new subject matter, it should be covered by a supplementary section, in no manner out of harmony with the Pomerene bill.

Section 27 is perfectly clear. Under the circumstances mentioned the carrier could not be expected to deliver the specific goods mentioned in the bill. As stated by Mr. Lynde, the section is perfectly clear, but to meet possible criticism he suggested the insertion of the word "themselves" after the word "goods" in line 4, page 13. Mr. Lynde and I conferred with shippers this morning as to a supposed ambiguity lurking in section 27, and the shippers were satisfied that

the section was all right, but that the insertion of the word "themselves" would free the section from captious criticism. This section was originally drawn by Prof. Williston for the Commissioners on Uniform State Laws in National Conference and is in his language.

Mr. Page wants to strike out the definition of the word "value" contained in section 53 of the Pomerene bill, lines 18 to 21, page 24. This is an old complaint of Mr. Page, which he has made of every uniform law yet proposed. The only commercial organization in the whole United States that ever made criticism of this definition is the one represented by Mr. Page. The criticism is without foundation, and the definition adopted is almost universal throughout the commercial world. This also was drawn by Prof. Williston and is in his exact language. Prof. Williston is not justified in his assertion, and the record in this hearing fails to bear him out. The Pomerene bill is absolutely perfect within itself in the very light of these suggestions, improperly called attacks.

The diversified commercial interests which have been heard have absolute confidence in the Pomerene bill because it speaks for all commercial interests, carrier, banker, receiver and shipper, and each and every class of shipper.

The principles of the Clapp-Stevens bill are excellent, but the details of the bill are defective and faulty. It bears no resemblance to the bill as introduced, in view of the numerous amendments, offered by the bankers, its propounders, from time to time as the hearing has progressed. It leaves the whole subject with but two provisions covered by Federal legislation and will result in an interstate instrument of commerce being governed but slightly by Federal law and largely by State laws in hopeless conflict. Section 4 protects one who "acquires" a bill of lading, but leaves the matter of its acquirement to the conflicting laws of 45 States. It speaks of acquiring for "value" but leaves the meaning of value to be defined by the laws of the various States. It speaks of "good faith," but leaves good faith to be governed by the conflicting laws of 45 States.

In other words, the bankers' bill creates an instrument of interstate commerce, a Federal measure in but few particulars, and a State measure in all other particulars to be governed slightly by a national law and largely by divergent State laws in each of the 45 States in which it may be issued, transferred, and dealt in.

The Pomerene bill, on the other hand, having protected this instrument of national and international commerce, gives to the instrument and to all parties thereto to its logical conclusion, the protection of Federal law, and defines the rights, duties, and obligations of all parties brought in privy therewith, whether carrier, banker, receiver, or shipper in definite language, free from doubt and ambiguity by distinctly choosing between conflicting decisions. It embodies the principle that at this stage legislation is cheaper than litigation, and that one rule clearly defined is better than many rules in many States seeking to govern a national instrument of credit which should be freed from localism of State courts and legislatures. This thought was well expressed on January 15, 1912, by Mr. Justice Van Devanter, in *Second Employers' Liability Cases* (223 U. S., 1), at page 51, where he said:

We are not unmindful that that end was being measurably obtained through the remedial legislation of the several States, but that legislation has been far from uniform;

and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States upon all carriers by railroads engaged in interstate commerce. (*The Lottawanna*, 21, Wall., 558, 581-582; *Baltimore & Ohio R. R. v. Baugh*, 149 U. S., 368, 378-379.)

That the Pomerene bill is far preferable to the Clapp-Stevens bill, is well expressed in the *Wall Street Journal* for February 29, 1912, as follows:

REVIEW AND OUTLOOK—WHICH BILL OF LADING?

Careful study of the two measures now before the Senate Committee on Interstate Commerce relating to bills of lading shows a striking difference of scope.

In the Stevens-Clapp bill the authors seem to have only in mind the decision of the Supreme Court in *Freemau* against Howard, made in 1855. Therefore the main purpose of the bill seems to be to prevent a carrier company from repudiating the act of its agent, when he gives a bill of lading without having the goods in his custody. This of itself may be a long step in the direction of modern business methods, but it is hardly enough. When it is taken into consideration that the value of bills of lading drawn every year is approximately \$25,000,000,000, of which \$5,000,000,000 pass through the banks, it is wise to give the instrument all the sanctity the law attaches to commercial paper.

Section 6 of Stevens-Clapp bill rightly exempts the carrier from liability when goods are taken from its custody by legal process. But if the instrument is made a negotiable paper, it seems as if the law should go still further. It might protect the holder of the bill by not allowing goods to be taken by legal process with a bill of lading outstanding in hands of third parties. This section might profitably have contained provision of rights and duties of warehousemen, and how the carrier's lien is to be enforced. Section 4 seems to leave many things open for judicial construction, and as such is a breeder of litigation, the last thing the shipper, carrier, or banker wants.

The bill introduced by Senator Pomerene, of Ohio, is a comprehensive codification of commercial usages on this subject, well thought out, clearly stated, and so carefully prepared that it is a model of good legislation. It seeks not only to do away with the frauds now made possible in bills of lading but to give the instrument all the sanctity of commercial paper, and at the same time protect the rights of carrier, shipper, and banker as far as can be done with justice to all parties.

Several years ago the Commissioners on Uniform Laws took up the question of a uniform bill of lading law in all the States and appointed a committee of some of its ablest members to draft a bill. After four years of work and discussion the form was approved in 1909, since which time it has been enacted into law in nine States, including Massachusetts, New York, Pennsylvania, and Ohio. The Pomerene bill is a virtual transcript of that form.

With 48 State legislatures working overtime to turn out conflicting laws, the task of the Commissioners on Uniform Laws is an uphill one. But they are making progress, and it seems wise to sacrifice the entirely well-intentioned Stevens-Clapp bill in order to pass the greatly more adequate measure introduced by Senator Pomerene.

As briefly as is consistent with the importance of the subject, a summary will be made of the various points touched on in the hearing under specified hearings as follows:

I. CONSTITUTIONALITY.

Since the last hearing, there has been printed in official form, the latest utterances of the Supreme Court of the United States on the broad scope of the commercial clause of the Constitution of the United States in the cases entitled "*Second Employers Liability Cases*" (Jan. 15, 1912), 223 U. S., 1. Two propositions of the syllabus appearing at page 2 of the report are as follows:

In regulating the relations of employers and employees engaged in interstate commerce, Congress may regulate the liability of employers to employees for injuries caused by other employees, even though the latter be engaged in intrastate commerce.

The power of Congress to insure the efficiency of regulations ordained by it is equal to the power to impose the regulations; and prohibiting the making of agreements by those engaged in interstate commerce which in any way limit a liability imposed by

Congress on interstate carriers does not deprive any person of property without due process of law, or abridge liberty of contract in violation of the "fifth amendment."

On page 3 a further proposition of the syllabus is as follows:

When Congress, in the exertion of a power confided to it by the Constitution, adopts an act, it speaks for all the people and all the States, and thereby establishes a policy for all, and the courts of a State can not refuse to enforce the act on ground that it is not in harmony with the policy of that State. (*Clafin v. Houseman*, 93 U. S., 130.)

Mr. Justice Van Devanter said, at page 47:

4. This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce.

Mr. Justice Van Devanter also said, at page 51, as follows:

We are not unmindful that that end was being measurably attained through the remedial legislation of the several States, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. (*The Lottawanna*, 21 Wall., 558, 581-582; *Baltimore & Ohio R. R. v. Baugh*, 149 U. S., 368, 378-379.)

II. CONSTITUTIONALITY CONCEDED.

There never yet has been proposed to Congress any progressive legislation in which its constitutionality has not been questioned. In view of the fact that any arguments against the constitutionality of the Pomerene bill are equally applicable to the Clapp-Stevens bills, it comes with poor grace from Prof. Williston to cast a constitutional doubt when the railroad lawyers particularly Mr. Thom concede the constitutionality of the Pomerene bill. This doubly so when we remember that the railroad companies have contested every other piece of legislation as unconstitutional and now concede that the Pomerene bill is constitutional.

III. ENGLISH LEGISLATION.

The law merchant as to bills of lading was first embodied in law July 2, 1794, in the great case of *Lickbarrow v. Mason* (5 Dunford and East Reports, 683), in which the rights of an innocent purchaser for value was protected against stoppage in transitu.

In my former testimony I had occasion to refer to the act of 18 and 19 Victoria, of August 14, 1855.

Ex-Senator Faulkner also had occasion to refer to this act at page 183 of the proceeding

Ex-Senator Faulkner gave a copy of the act with its purported preamble but omitted part of the preamble.

This English statute is reproduced in the sixth edition (1910) *Scrutton on Charter Parties and Bills of Lading*, page 379, and the part of the preamble omitted by Senator Faulkner is as follows:

Whereas, by the custom of merchants, a bill of lading of goods being transferable by indorsement, the property in the goods may therefore pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property.

It is set forth in Scrutton on Charter Parties and Bills of Lading, at pages 62 and 63, article 21, as follows:

In the hands of a consignee or indorsee for value (t) the bill of lading is by statute (u) conclusive evidence that the goods represented (x) by it to be shipped were actually shipped, as against the person signing it (y), unless either (1) the holder took the bill with actual notice that such goods were not on board; or, (2) the signer shows that the mistake was not occasioned by his default, but was wholly occasioned by the fraud of the shipper, holder, or some person under whom the holder claims (z).

In a footnote the author states that it is binding if signed by the owner or signed by a servant.

In another footnote the author points out the diminishing power of a master that these documents are signed largely by the clerk or agent of the owner.

This statute was further amplified by 24 Victoria, chapter 10, given in Scrutton, at page 380, as follows:

6. The high court of admiralty shall have jurisdiction over any claim by the owner, or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: *Provided always*, That if in any such cause the plaintiff do not recover £20, he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court (d).

It is quite significant that there is no English decision denying the liability of a rail carrier in the cases of fraudulent and accommodation bills of lading. Cases of this kind must have arisen, and it is fair to assume that the railroads never denied liability, otherwise cases could be found.

If any such question had arisen as to rail carriers in 1855, when the statute of 18 and 19 Victoria was passed, shippers by railroad would have had little chance for favorable legislation if we take the contemporaneous history of the times as recorded in the *Edinburg Review* and Herbert Spencer as recorded in *Parsons The Railways, The Trusts, and The People*, pages 282-285. In 1845 157 members of Parliament each own stock ranging as high as \$1,500,000, and it is recorded "The supporters of railway measures openly boasted of the number of votes they could command in the House."

Herbert Spencer is quoted as saying:

We have but to look back a few years and mark the unanimity with which companies adopted the policy of getting themselves represented in the legislature, to see that the furtherance of their respective interests was the incentive. How well this policy is understood amongst the initiated may be judged from the fact that gentlemen are now in some cases elected on boards simply because they are members of Parliament. Of course this implies that railway legislation is affected by a complicated play of private influences.

IV. CERTIFIED BILLS OF LADING.

Senator Faulkner has called attention to the fact that the southern railways certify bills of lading as set forth on page 189 of the record:

The Southern Railway Co. hereby certifies: That ——— is its regularly appointed ——— agent at ——— and as such is authorized to sign bills of lading in accordance with the regulations of this company, and that the signature on the attached order notify bill of lading No. —, dated — (place of issue) —, (date) —, 191—, covering — bales of cotton marked — is his signature.

So far as fraudulent and accommodation bills are concerned, this certificate is worthless because it states that the agent "is authorized to sign bills of lading in accordance with the regulations of this company." All a railroad has to do is to have private instructions embodying its regulations that the agent has no authority to sign in the

absence of actual possession of the goods, and every person is then put on notice—constructively—and the railroad escapes liability. In fact the result will be with such a certificate, even in such States as New York, that the rules of liability will be abrogated on the ground of constructive notice of the limitations on the agent's authority. This certificate instead of being an aid of legal and commercial negotiability smirches the instrument.

V. WAREHOUSE RECEIPTS.

During the course of this hearing the analogy has been drawn between warehouse receipts to order and order bills of lading. The great value of warehouse receipts is set forth in Dondlinger on "The Book of Wheat," published in 1910, at page 245.

These general receipts are usually reliable, although at least one gigantic swindle has been perpetrated by means of fraudulent warehouse receipts. From the beginning, however, the receipts have been considered as good as the wheat which they represented. In other words, wheat had become a perfect representative commodity. Being a staple article when classified, receipts issued against graded wheat are as current and negotiable as a bank check. They have the same meaning in Liverpool or Antwerp as in Chicago or New York. This greatly facilitates dealing in wheat, for a contract can be fulfilled by delivering a receipt. Under ordinary conditions, such receipts can be purchased in the open market at any time.

Section 20 of the act to make uniform warehouse receipts is in substance the same as section 23 of the Pomerene bill, and may be found in American Uniform Commercial Acts, page 195, as follows, to wit:

SEC. 20. LIABILITY FOR NONEXISTENCE OR MISDESCRIPTION OF GOODS.—A warehouseman shall be liable to the holder of a receipt for damages caused by the non-existence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that the packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate, or of the kind they were said to be by the depositor.

This act is now law in 23 States, Territories, and Districts as follows: California, Colorado, Connecticut, District of Columbia, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, and Wisconsin.

VI. FINANCING THE MOVEMENT OF GRAIN.

The testimony as to financing the movement of staple commodities through order bills of lading, as described by the many witnesses, is graphically pictured in Dondlinger "The Book of Wheat" (1910), pages 227-228, as follows:

The large money centers are not as great a factor in the moving of the wheat crop as they were at an earlier date, for to a large extent the rural sections now do their own banking. The banking power has grown much faster than the increasing money requirements for moving crops. In 1890 the banking power of the chief grain States was to the money power required to move the grain crop as 4 to 6, and a decade later the ratio was 7 to 6. The grain-growing region now has sufficient capital to move the cereals from first hands and to start them well on their way through the commercial channels. A dealer furnishing money for about 175 country elevators in Minnesota and the Dakotas sends out \$500 to \$1,000 to each elevator, making from \$100,000 to

\$150,000 sent out the first day. Cars are not obtained on this day, and perhaps 50,000 to 100,000 bushels are purchased. A sort of paymaster is located in the elevator towns, and these keep the principal informed as to the amount of wheat purchased daily and as to the amount of cash that will be required the next day. Much of this cash must usually be borrowed, but warehouse receipts for grain already in elevators are good security on which an amount of money close to the cash price of the wheat can be borrowed from the country banker. There must be a carload of the same grade of grain before shipment can be made. When the grain does begin to move it takes several days for it to get to market, and five or six days' receipts are often on hand before cash is realized. As soon as a car is loaded, the elevator man draws a sight draft on the commission house at the primary market for the amount that he borrowed from the country banker, attaches the bill of lading, and deposits the draft in the country bank as a cash item. Cables are frequently sent at night to every market of the world in order to sell wheat. What can not be sold must be held, and future sales upon the speculative markets can be made as an insurance against loss from price fluctuations.

The country banker sends the draft to his correspondent at the market, where collection is made. As soon as the wheat reaches the terminal warehouse, it is again available for a loan close to its market value. If the terminal factor is an exporter, he also attaches bills of lading to a draft drawn against the shipment, and his banker accepts this draft as cash at current exchange rates, which include interest on the money until the draft is paid. Outside of the money used by the railroads, it requires about \$500,000,000 to move the grain crops. If the farmers do not wish to sell their wheat at once, they can place it in the elevator and receive a receipt on which they can borrow 90 per cent of its value from the banks.

The importance of bills of lading in interstate and foreign commerce is thus set forth in the *Wall Street Journal* for February 21, 1912:

BILLS OF LADING.

There is at last a prospect of a Federal law regulating bills of lading, and the business interests of the country may well congratulate themselves.

Following a decision of an English court, the Supreme Court of the United States once decided that if a carrier's agent issued a bill of lading, without having the goods purporting to be covered thereby in his possession, the carrier was not liable therefor, even if the bill were negotiated and held by an innocent third party who had given value for it. Parliament changed the law in England and made the carrier liable; but in the Federal courts the law still stands as here stated. Some State courts followed the Supreme Court, a few others refused to accept the doctrine, while other States changed the statute law to make the carrier liable for the agent's act.

A consequence of this confusion is that in some States the negotiation of fraudulent bills of lading is possible, to say nothing of duplicate bills and of "spent" bills that have not been taken up when the goods were delivered; and in many jurisdictions a bank which has advanced money on the bill of lading has no recourse except against the shipper.

In a case originating in a State whose courts have changed the law by judicial construction, the Federal courts would be obliged to follow the law as laid down by the Supreme Court. In one originating in a State whose statutes changed the law, they would take notice of the statute and decide exactly the reverse, while the State courts would follow the statutes or judicial decisions of their State. The student may work out for himself the variety of different decisions that might be obtained in the different courts on causes of action exactly similar.

Mr. Justice Clifford, of the Supreme Court, once said that "commercial law is a system of jurisprudence acknowledged by all maritime nations, and upon no subject is it of more importance that there should be as far as practicable uniformity of decisions throughout the world." He was speaking with reference to commercial paper; but the bill of lading has now assumed a world-wide importance and is the necessary collateral of the bill of exchange with which it goes side by side. Our grain and cotton shipments are financed by it in the markets of the world, and in domestic commerce it goes with the raw materials to the factory, and with the finished product wherever there is a market.

We are not living unto ourselves alone. We produce for world markets; and bills of lading in State, interstate, and foreign commerce, when attached to a draft on the consignee of commodities, should be construed by the same law that governs the draft, which is its complement. All over the civilized world the law is that no defense can be made to an action on it in the hands of an innocent third party for value.

VIII. TRANSFER BILLING.

Ex-Senator Faulkner has sought to set forth that the railroads were deprived of the right of transfer billing in *Missouri Pacific Railway v. McFadden* (154 U. S., 155). Supreme Court of the United States distinguished that case at page 520 in *Arthur v. Texas & Pacific Railway Co.* (Feb. 25, 1907; 204 U. S., 505), the syllabus of which is as follows:

Where a railway company has no other place for delivery of cotton than the stores and platform of a compress company, where all cotton transported by it is compressed at its expense and by its order, its acceptance of, and exchange of its own bills of lading for, receipts of the compress company passes to it the constructive possession and absolute control of the cotton represented thereby, and constitutes a complete delivery to it thereof; nor can the railway company thereafter divest itself of responsibility for due care by leaving the cotton in the hands of the compress company as that company becomes its agent.

Mr. Justice Peckham said (pp. 515-517):

The fact that in getting the cotton compressed the railway chose to have it done by an independent contractor, over whose acts it had no control while the cotton was being compressed, and the fact that it would order the compress company after compressing to load the cotton on cars selected by defendant's agent, did not in any way affect the fact that the cotton had been received by the railway company, and that it was thereafter subject to its full control. The defendant could not divest itself of the responsibility of due care by leaving the cotton to be compressed and loaded by the compress company. The latter company was, while so acting, the agent of the defendant, chosen by it, and, as such, the defendant was responsible for any lack of proper care of the cotton by the compress company (*Bank of Kentucky v. Adams Express Co.*, 93 U. S., supra.)

It is urged that the case cited does not cover the facts herein, because in the reported case the attempt was to secure the immunity of the defendant express company from the consequences of the negligence of the railroad in doing the very thing that the express company had agreed to do, viz, transport the money; while in the case before us the negligence of the compress company (assuming there was such) was not in transporting the cotton, which the railway company had agreed to do, but in caring for it while awaiting compression. We see no difference, in fact, which would lead to a different result.

The compression was done for the convenience of the railroad company, after the company had received the cotton and before the actual transportation had commenced. In order to enable it the more conveniently to do the work of transportation it can not divest itself of its obligation to exercise due care while the cotton is in the control of the compress company, although the latter is an independent contractor and not under the immediate control of the railway company while doing the work of compression in its behalf. There would be no justice in such holding, and we are clear it would violate the general rule that the carrier, after the freight had been received by it, must be regarded as liable, at least, for the negligence of its own servants, and also for that of the servants of an independent contractor, employed by it to do work upon the freight for its own convenience and at its own cost.

It is always in the power of the railway company to make the cotton contrast the agent of the railway company, and to continue the practice of transfer billing, the possession of the cotton compress company being the possession of the railway company.

VIII. SPENT BILLS OF LADING.

So much stress has been laid on fraudulent and accommodation bills of lading that spent bills of lading have not been kept constantly in mind. Many of the illustrations given have been of frauds perpetrated by outstanding spent bills of lading and is as great a menace to commerce as fraudulent and accommodation bills. On this subject the Pomerene bill takes care of this subject in sections 14 and 15.

IX. STATE LEGISLATION.

In many States carriers are liable for fraudulent or accommodation and spent bills of lading and no instance has ever been heard from in which the railroad companies demanded specific additional compensation because of such liability. In the nine States which have passed the Pomerene bill no claim was ever made before their legislatures that there should be an increase of rates by reason thereof and no such claim made since their passage. If the passage of this bill in all the States and by Congress would increase the damage claims against railroads, commerce should bear this burden by an increase in all rates to meet it but there should not be four kinds of bills of lading, to wit, straight bill of lading, guaranteed straight bill of lading, order bill of lading, guaranteed order bill of lading with a separate specific rate attached to each.

X. UNIFORM BILL OF LADING AND THE LAW OF CARRIERS.

The uniform bill of lading heretofore referred to at page 197 of the record of this hearing must not be confounded with the law of bills of lading. The conditions contained on the uniform bill of lading are contractual limitations on the law of carriers and deal primarily with the law of carriers. They create no Federal rights enforceable in the Federal courts. The Pomerene bill deals primarily with a bill of lading as an instrument of national and international commerce, and secondarily with the law of carriers, giving, however, Federal sanctions to the rights, duties, and obligations arising thereunder ultimately reviewable by the Supreme Court of the United States and thereby giving them a uniform application, which uniformity will be indestructible by conflicting State decisions.

XI. SUGGESTION AS TO SECTION 3.

A suggestion has been made as to section 3 which will not change its meaning. Section 3 of the Pomerene bill reads as follows, to wit:

SEC. 3. That a carrier may insert in a bill issued by him any other terms and conditions: *Provided*, That such terms and conditions shall not—

- (a) Be contrary to law or public policy; or
- (b) In anywise impair his obligation to exercise at least that degree of care in the transportation and safekeeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own.

The suggestion is to strike out paragraph (b). As paragraph (b) is a mere illustration of paragraph (a) there is no harm in striking out paragraph (b) and to do so is in no sense a change or amendment of the Pomerene bill. Paragraph (a) with its illustration as contained in paragraph (b) is declaratory of the law as stated by the Supreme Court of the United States and fully elucidated in the matter of released rates (May 14, 1908; 13 I. C. C. R., 550), the syllabus of which is as follows:

- 1. If a rate is conditioned upon the shipper's assuming the risk of loss due to causes beyond the carrier's control, the condition is valid.
- 2. If a rate is conditioned upon the shipper's assuming the entire risk of loss, the condition is void as against loss due to the carrier's negligence or other misconduct.
- 3. If a rate is conditioned upon the shipper's agreeing that the carrier's liability shall not exceed a certain specified value, (a) the stipulation is valid when loss occurs through causes beyond the carrier's control; (b) the stipulation is valid, even when.

loss is due to the carrier's negligence, if the shipper has himself declared the value, expressly or by implication, the carrier accepting the same in good faith as the real value, and the rate of freight being fixed in accordance therewith; (c) the stipulation is void as against loss due to the carrier's negligence or other misconduct if the specified amount does not purport to be an agreed valuation, but had been fixed arbitrarily by the carrier without reference to the real value; (d) the stipulation is void as against loss due to the carrier's negligence or other misconduct if the specified amount, while purporting to be an agreed valuation, is in fact purely fictitious and represents an attempt to limit the carrier's liability to an arbitrary amount.

4. A carrier may lawfully establish a scale of charges applicable to a specific commodity and graduated reasonable according to value. These rates must be applied in good faith, regard being had to the actual value of the property offered for shipment.

5. A carrier must not make use of its released rates as a means of escaping liability for the consequences of its negligence, either wholly or in part.

6. It is a mischievous practice for carriers to publish in their tariffs and on their bills of lading rules and regulations which are misleading, unreasonable, or incapable of literal enforcement in a court of law.

7. A stipulation that an additional charge of 20 per cent shall be collected on property that is shipped not subject to limited liability is unreasonable.

XII. SUGGESTION AS TO SECTION 23.

Section 4 of the Stevens bill, as introduced, contains no provisions on shippers' load and count. The bankers have suggested that there be added thereto the provisions of section 23 of the Pomerene bill. It has been suggested to add a proviso to section 4 of the Stevens bill and section 23 of the Pomerene bill requiring the carriers to count, when requested by the shipper, and when so requested, the carrier shall not insert shippers' load and count in the bill of lading. It is therefore quite clear that this suggestion is no criticism of section 23 of the Pomerene bill, but is a suggestion for a positive law upon a new subject. In view of this fact, it is now agreed by everybody that the suggestion should be embodied in a new independent section, which is quite proper, and therefore the suggestion is no criticism of section 23 of the Pomerene bill, which is in the exact language as prepared by Prof. Williston, as the representative of the Commissioners on Uniform State Laws in National Conference.

XIII. SUGGESTION AS TO SECTION 27.

Section 27 of the Pomerene bill reads as follows, to wit:

SEC. 27. That after goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be negotiable.

This section is perfectly clear, as has been heretofore pointed out, and the suggestion has merely been made to insert the word "themselves" after the word "goods" on page 13, line 4, of the Pomerene bill to remove any possible captious criticism. This section is the exact language as prepared by Prof. Williston as the representative of the Commissioners on Uniform State Laws.

XIV. SUGGESTION AS TO DEFINITION OF VALUE IN SECTION 53 OF THE POMERENE BILL.

Section 53 of the Pomerene bill contains a definition of value as—

"Value" is any consideration sufficient to support a simple contract. An antecedent or preexisting obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor.

This definition of value has received the universal indorsement of all commercial organizations, with the solitary exception of the Merchants' Association of New York, represented by Mr. Page.

In 1821 in the case of *Coddington v. Bay* (5 Johnson Chancery, 54) a New York court unfortunately gave a common law as distinguished from a law merchant definition of value. This was affirmed in 1822 in *Bay v. Coddington* (20 Johnson, 637). In reference thereto, Daniel states, in volume 1, negotiable instruments, section 831 c, that "to reconcile the New York decision is impossible." In 1842 in *Swift v. Tyson* (16 Peters, 1), the Supreme Court of the United States, in a case arising in New York, repudiated *Coddington v. Bay*, resulting in two definitions of value in New York, depending whether a matter was litigated in a State or Federal court. In 1907 the legislature of New York repudiated *Coddington v. Bay* in section 51 of the negotiable instruments law of that State, found in volume 3, Birdseye, Currie and Gilbert's Consolidated Law of New York, page 3648. The New York statutory definition of value is now the statutory definition of value in 39 States, Territories, and possessions of the United States. The Legislature of New York again repudiated the definition of value in *Coddington v. Bay* in its warehouse receipts act, section 142, General Business Laws of New York, contained in volume 3, Birdseye, Currie & Gilbert's Consolidated Laws of New York, page 1838, which is now adopted in 23 States, Territories, and Districts of the United States. The uniform sales act contains the same definition in seven out of eight States, the Merchants Association succeeding in having it dropped in New York, but did not succeed in having the definition in *Coddington v. Bay* substituted therefor. The uniform bills of lading act (Pomerene act) contains the same definition in eight out of nine States, the Merchants Association succeeding in having it dropped in New York, but did not succeed in having the definition in *Coddington v. Bay* substituted therefor. This action of the Merchants Association makes doubly impressive the language of Mr. Justice Van Devanter, already referred to, in *Second Employers Liability Cases* (223 U. S., 1, p. 51), already quoted. The Merchants Association has had its full day in court, as appears in *American Uniform Commercial Acts* (Jan. 1, 1910), pages 44-59, both inclusive, as follows:

The Merchants' Association of New York City, through Mr. Abram Elkus, of Messrs. James, Schell & Elkus, has addressed a communication to the committee criticizing the definition of the word "value" as contained in section 51 of the fourth tentative draft¹ of the bills of lading act. The criticism is divided into two parts, the first relating to the first sentence and the second to the second sentence of the definition. The word "value" appears 14 times in the act, being found in sections 6, 7, 8, 9, 14, 15, 17, 23, 24, 32, 34, 35, 38, 39, 40, 42. The definition of the word "value" contained in section 51¹ would be read into each of these sections. We will consider the criticisms separately:

"Value is any consideration sufficient to support a simple contract."

This in no wise changes the now generally accepted definition of value as to negotiable credit instruments and securities.

The English bills of exchange act (Chalmers 5th Ed., 1896, p. 80) provides:

"Sec. 27. Valuable consideration for a bill may be constituted by (a) any consideration sufficient to support a simple contract."

The same act (*ibid.*, p. 7) provides:

"Sec. 2. Value means valuable consideration."

These sections as part of the English Act have been adopted in 45 English Provinces, colonies, and dependencies.

¹ Sec. 53 in the final draft.

The uniform negotiable instruments act (Brannan on Negotiable Instruments Law, p. 9) provides:

"SEC. 25. Value is any consideration sufficient to support a simple contract."

The same act provides (*ibid.*, p. 39):

"SEC. 191. Value means valuable consideration."

This act has now been enacted in 38 States and Territories.

The sales act (sec. 76) uses the same definition, and this has been enacted in six States and Territories.

The warehouse receipts act (sec. 58) uses the same definition. This has been enacted in 18 States and Territories.

It may therefore be said that this definition prevails in nearly every English-speaking nation, state, colony, territory, insular possession, and dependency. It does not unsettle any general unwritten law because there are but few judicial decisions upon the subject. Williston on Sales (1909, sec. 620, pp. 1036-1040) contains an excellent discussion of the definition of "value."¹ Mr. Elkus suggests five suppositious cases which would rarely arise in practice, nor would all of them constitute value in the meaning of the definition.² Furthermore, transactions must be bona fide to be sustained. In the humble judgment of the committee much of Mr. Elkus's difficulty arises from his failure to distinguish between "value" and "good faith," both of which are required by the act. A successful fraud in the five instances suggested is too remote to be sufficient to modify the definition of value which has now been so universally accepted.

"An antecedent or preexisting obligation whether for money or not constitutes value where a bill is taken either in satisfaction thereof or as security therefor."

The English bills of exchange act (Chalmers, 5th ed., 1896, p. 80) provides:

"SEC. 27. (b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time."

As heretofore stated, this definition has been adopted in 45 English provinces, colonies, and dependencies.

The uniform negotiable instruments act (Brannan, p. 9), provides:

"SEC. 25. An antecedent or preexisting debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time."

As before stated, this has now been enacted in 38 States and Territories.

The warehouse receipts act provides:

"SEC. 58. An antecedent or preexisting obligation, whether for money or not, constitutes value where a receipt is taken, either in satisfaction thereof or as security therefor."

This has now been enacted in 18 States and Territories.

The uniform sales act provides:

"SEC. 76. An antecedent or preexisting claim, whether for money or not, constitutes value where goods or documents of title are taken either in satisfaction or as security therefor."

It may likewise be said of the second part of this definition as has been said of the first half, that this definition is now the law of nearly every English-speaking nation, territory, colony, Province, insular possession, and dependency.

The criticism may in part be attributed to a radical difference of opinion which has existed between the New York courts on the one hand and the courts of most States and the Federal courts on the other on this subject. Down to the passage of the negotiable instruments law in New York in 1897, the New York State courts adhered to a doctrine different from that embodied in the negotiable instruments act. In 1842, in a case arising in a New York Federal court, by reason of diversity of citizenship (being the ruling, leading, and celebrated case of *Swift v. Tyson*, 16 Peters, 1), the Supreme Court of the United States claimed the right to determine for itself the rule of the law merchant applicable in New York. Mr. Justice Story adopted the rule now embodied in the negotiable instruments act. He put it expressly upon the ground of producing uniformity of commercial law in the commercial world. When the commissioners on uniform State laws framed the negotiable instruments act (through Mr. Crawford, a New York lawyer) they were forced by reason of this lack of uniformity to adopt one rule or the other and refused to adopt the New York State court rule and adopted the rule laid down by the Supreme Court of the United States in *Swift v. Tyson*, *supra*.

¹ For convenience this is printed as Appendix A.

² The five instances suggested by Mr. Elkus are as follows:

1. The promise of his fiancée to marry him.
2. The promise of a friend to pay him an annuity or support him for a period of time.
3. The promise of another to give a sum to a third person—the wife, child, or relative of the trader.
4. A promise to abstain from a certain business in a specified locality and for a specified time.
5. A promise not to sue.

In deciding *Swift v. Tyson*, *supra*, Mr. Justice Story said (pp. 19-20):

"The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde* (2 Burr., 883, 887), to be in a great measure not the law of a single country only, but of the commercial world. Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.¹

"It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying, that a preexisting debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments. Assuming it to be true (which, however, may well admit of some doubt from the generality of the language), that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due; we are prepared to say that receiving it in payment of, or as security for, a preexisting debt, is according to the known usual course of trade and business. And why, upon principle, should not a preexisting debt be deemed such a valuable consideration? It is for the benefit and convenience of the commercial world, to give as wide an extent as practicable to the credit and circulation of negotiable paper, that it may pass not only as security for new purchases and advances, made upon the transfer thereof, but also in payment of, and as security for, preexisting debts. The creditor is thereby enabled to realize or to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor also has the advantage of making his negotiable securities of equivalent value to cash. But establish the opposite conclusion, that negotiable paper can not be applied in payment of, or as, security for, preexisting debts, without letting in all the equities between the original and antecedent parties, and the value and circulation of such securities must be essentially diminished, and the debtor driven to the embarrassment of making a sale thereof, often at a ruinous discount, to some third person, and then, by circuitry, to apply the proceeds to the payment of his debts. What, indeed, upon such a doctrine, would become of that large class of cases, where new notes are given by the same or by other parties, by way of renewal or security to banks, in lieu of old securities discounted by them, which have arrived at maturity? Probably, more than one-half of all banks' transactions in our country, as well as those of other countries, are of this nature. The doctrine would strike a fatal blow at all discounts of negotiable securities for preexisting debts."

This was reaffirmed in the case of *Brooklyn City and Newtown Railroad Company v. the National Bank of the Republic of New York* (1880) 102 U. S. 14.

In this case Mr. Justice Harlan said (pp. 25-26):

"According to the very general concurrence of judicial authority in this country as well as elsewhere, it may be regarded as settled in commercial jurisprudence—there being no statutory regulations to the contrary—that where negotiable paper is received in payment of an antecedent debt; or where it is transferred, by indorsement, as collateral security for a debt created, or a purchase made, at the time of transfer; or the transfer is to secure a debt, not due, under an agreement express or to be clearly implied from the circumstances, that the collection of the principal debt is to be postponed or delayed until the collateral matured; or where time is agreed to be given and is actually given upon a debt overdue, in consideration of the transfer of negotiable paper as collateral security therefor; or where the transferred note takes the place of other paper previously pledged as collateral security for a debt, either at the time such debt was contracted or before it became due—in each of these cases the holder who takes the transferred paper, before its maturity, and without notice, actual or otherwise, of any defense thereto, is held to have received it in due course of business, and, in the sense of the commercial law, becomes a holder for value, entitled to enforce payment, without regard to any equity or defence which exists between prior parties to such paper.

"Upon these propositions there seems at this day to be no substantial conflict of authority. But there is such conflict where the note is transferred as collateral security merely, without other circumstances, for a debt previously created. One of the grounds upon which some courts of high authority refuse, in such cases, to apply the rule announced in *Swift v. Tyson* is that transactions of that kind are not in the usual and ordinary course of commercial dealings. But this objection is not sustained

¹ This popular quotation from Cicero's *De Re Publica* has been compared with the original and the exact language of Cicero is as follows: "Nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnis gentis, et omni tempore, una lex, et sempiterna et immutabilis continebit." (Cicero, *De Re Publica*, III, 28-33; Tauchnitz, Leipzig, 1865, p. 214.)

by the recognized usages of the commercial world nor, as we think, by sound reason. The transfer of negotiable paper as security for antecedent debts constitutes a material and an increasing portion of the commerce of the country. Such transactions have become very common in financial circles. They have grown out of the necessities of business, and, in these days of great commercial activity, they contribute largely to the benefit and convenience both of debtors and creditors."

He further said (p. 28):

"Our conclusion, therefore, is, that the transfer, before maturity, of negotiable paper, as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case the bona fide holder is unaffected by equities or defences between prior parties, of which he has no notice. This conclusion is abundantly sustained by authority. A different determination by this court would, we apprehend, greatly surprise both the legal profession and the commercial world." (See *Bigelow's Bills and Notes*, 502, et seq.; 1 *Daniel, Neg. Inst.* (2d ed.), c. 25, secs. 820-833; *Story, Promissory Notes*, secs. 186, 195 (7th ed.) by *Thorndyke*; *Parsons, Notes and Bills* (2d ed.), 218, sec. 4, c. 6; and *Redfield & Bigelow's Leading Cases upon Bills of Exchange and Promissory Notes*, where the authorities are cited by the authors.)

Mr. Justice Clifford, in a concurring opinion, said (pp. 32-33):

"Commercial law is a system of jurisprudence acknowledged by all maritime nations, and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world.

"Bills of exchange and promissory notes are commercial paper in the strictest sense, and as such must ever be regarded as favored instruments, as well on account of their negotiable quality as their universal convenience in mercantile affairs. Everywhere the rule is that they may be transferred by indorsement, or when indorsed in blank or made payable to bearer they are transferable by mere delivery. International regulations encourage their use as a safe and convenient medium for the balances among mercantile men of different nations, and any course of judicial decision calculated to restrain or impede their full and unembarrassed circulation for the purposes of foreign or domestic trade would be contrary to the soundest principles of public policy." (*Goodman v. Simonds*, 20 How. 343, 361.)

He further said (pp. 57-58):

"Transactions of a commercial character extend throughout the civilized world, and it is well known that they are chiefly conducted through the medium of bills of exchange and other negotiable instruments. Uniformity of decision is a matter of great public convenience and universal necessity, acknowledged by all commercial nations. Should this court adopt a principle of decision which when carried into effect would establish as many different rules for the determination of commercial controversies as there are States in the Union, it would justly be considered a public calamity, as it must necessarily depreciate our negotiable securities in all the foreign markets of the world where our merchants have commercial transactions.

"Staple and immutable rules are necessary to give confidence to those who receive such securities in the usual course of business, when indorsed in blank, or made payable to bearer, so that if such a bill or note is made without consideration, or be lost or stolen, and afterwards be negotiated for value to one having no knowledge of such facts, in the usual course of business, his title shall be good, and he shall be entitled to collect the amount."

A full list of authorities may be found in *Crawford's Annotated Negotiable Instruments Law* (3d edition), pages 39-40, note (b) and *Brannan Negotiable Instruments Law* (1908) pp. 206-207.

This definition has been particularly commended by Dean Ames. (See *Brannan Negotiable Instruments Law*, p. 43.)

The only courts which have attempted to construe away this section of the negotiable instruments act and destroy uniformity have been a few inferior ones of New York, but a majority of these inferior courts are the other way. To yield to the criticism would embalm an obsolete rule of law which once prevailed in New York, in the New York State courts prior to the adoption of the negotiable instruments act in 1897, and which some lawyers have succeeded in persuading a very few of the inferior courts of New York to adhere to in the face of the distinct provisions of the negotiable instruments act, and destroy the manifest purpose of uniformity of that act.

The warehouse receipts act, recognizing the usage of the commercial world, placed warehouse receipts to order or bearer on the basis of negotiable instruments, and therefore adopted the definition in the negotiable instruments act. Mr. Elkus argued against the definition before the house and senate judiciary committees of New

York, and before Governor Hughes, of New York, and before the American Bar Association¹ and it was overruled in each instance. This definition of the warehouse receipts act has now been adopted in 18 States and Territories.

The transfer of stock act, recognizing the usage of the commercial world, places certificates of stock on the basis of negotiable instruments, and therefore adopted the definition in the negotiable instruments act.

The bills of lading act likewise preeminently recognizing the usage of the commercial world makes bills of lading to order negotiable, and it is peculiarly proper that the definition in the negotiable instruments act should be adopted. This definition is more important in the bills of lading act than in the warehouse receipts act, because order bills of lading usually accompany negotiable drafts, and each should be governed by the same law in this respect. President Hadley (of Yale University) in his classic on Railroad Transportation, has well said (at pp. 18 and 19): "We no longer produce for the home market, but for the world's markets. It is by the world's supply and demand that prices are made. The development of transportation has been the main instrument of this change. It has gone hand in hand with the extension of the credit system, each has supplemented the other. The bill of lading is made to serve the same purpose as the bill of exchange."

The bill of lading specified the unit of quantity of a commodity; a bill of exchange (draft) the unit of value; one is the necessary complement of the other.

Mr. Albert Strauss, of Messrs. J. & W. Seligman & Co., in a recent address on the currency problem (p. 76), has elucidated the great utility of an order bill of lading accompanying a draft in the export of cotton as follows:

"The English buyer arranges with his banker to accept the drafts of the American cotton dealer, and notifies the American dealer to draw his 60-day bill on the London bank, with shipping documents attached. The American cotton dealer borrows from his local bank to buy cotton from the farmer, whom he pays in cash; when he has gathered enough cotton for shipment, he ships on, through bills of lading, from his southern home direct to Liverpool; these bills of lading he attaches to his 60-day draft on London, and the London draft, with its documents, he attaches to a draft on his New York agent. With this New York draft he repays the local bank. The New York agent, in turn, sells this 60-day bill on London to a New York banker, and with the proceeds meets the cotton dealer's draft on him. On the other hand, the exchange banker sends the 60-day bill to London for discount, and against the proceeds draws a demand bill on London."

Mr. Logan McPherson, in *Railroad Freight Rates in Relation to the Industry and Commerce of the United States*, just published (May, 1909), after classifying order bills of lading as commercial paper, says (p. 190):

"The [order] bill of lading is an instrument for facilitating commerce, the importance of which is not generally known. It is not only a certificate that merchandise is in transit, but a first lien upon that merchandise, in a way a title to ownership, and, as fulfilling this function, negotiable. For example, a grain dealer buying a carload of wheat at the western field may, and in the vast majority of cases does, deposit the bill of lading covering that car in a bank as security for a loan to its value. If that car goes through to a port where it is sold for export the loan may not be paid and the bill of lading lifted until the grain is transferred from the car to the vessel. There is a similar procedure in the case of other commodities, with the bills of lading covering raw material to the factory and finished produce from the factory. The [order] bill of lading thus contributes to that fluidity of the circulating medium, that celerity in the transfer of merchandise, which are striking achievements and essential requirements of current civilization."

In *Prendergast on Credit and Its Uses* (1906), page 42, the problem is thus stated: "A merchant having purchased a bill of goods on a specified term of credit, gives to the seller a bill of exchange, drawn on himself, representing the amount of the invoice. The seller needing money for his own business, passes this bill of exchange, with his indorsement thereon, to another from whom he has made a purchase, or to whom he may be in debt for any other reason. The third person to whom the bill of exchange is given passes it on again in liquidation of an indebtedness of his own, and so on. In this way that bill of exchange may serve in the effacement of many different accounts and return to the drawer literally covered with indorsements. What is true as to the function of a medium of exchange, which the particular bill referred to has discharged, may be equally true of many other forms of credit instruments which may be called to mind. Promissory notes, drafts, checks, bills of lading, and warehouse receipts are all credit instruments which can be used as mediums of exchange or substitutes for money."

¹ See vol. 31, Reports American Bar Association (1907), pp. 55-58.

Our commercial law must rest on sound, economic principles and actual commercial practices. Bills, drafts, notes, checks, and bills of lading are in fact and practice parts of the currency of commerce.

Mr. Elkus refers to four possible cases where frauds could be perpetuated.¹ It must not be forgotten that the word "obligation" clearly means a legal obligation. In addition the suppositious cases would rarely arise in practice and the transactions to be sustained must be bona fide. As we have already taken occasion to say, we believe much of Mr. Elkus' difficulty arises from his failure to distinguish between "value" and "good faith," both of which are required. Successful fraud in the four instances supposed are too remote to be sufficient to modify the rule of "antecedent" liability which has now been so universally accepted. Relief can be had in cases of insolvency under the bankruptcy act, section 60 (Loveland on Bankruptcy—3d ed., 1907, pp. 1262-1263), which remedy is expressly reserved by section 49 of the bills of lading act.²

Mr. Elkus says this is all revolutionary. The uniform negotiable instruments act provision as to value was revolutionary in New York as to the New York courts only, but was not revolutionary even in New York in the United States courts sitting in New York. Mr. Elkus has not pointed out a single instance of successful fraud under the definition contained in the negotiable instruments act.

We can not agree with Mr. Elkus that there will be any contraction of credits, but on the contrary, to eliminate this definition of value is to diminish mobility of credit.

Mr. Elkus says this definition is an experiment. It is contrary to New York courts' definition of "value" down to the time of the adoption of the negotiable instruments act in 1897. However, since 1842, the Federal courts of New York uniformly applied the definition of "value" as contained in the negotiable instruments act.

The definition of the word "value," as to negotiable instruments is in harmony with the general commercial understanding and the decisions of the Supreme Court of the United States since 1842, and of most of the States. The only strongly conflicting view was that entertained by the New York courts down to the adoption of the negotiable instruments act in 1897, and this local New York view was never recognized by the Federal courts sitting in New York but repudiated in 1842 in *Swift v. Tyson*, supra.

Your committee does not believe that in New York State there is an overwhelming State sentiment against the definition of value in the bills of lading act. It is absolutely essential to New York's international trade in which bills of lading constitute a commodity currency passing freely from hand to hand.

"It is a matter of common knowledge that intense competition exists among the cities of Boston, New York, Philadelphia and Baltimore to control, or at least divide, the port international traffic. (Noyes on American Railroad rates, pp. 134-135; Hadley on Railroads Transportation, pp. 82-99; Meyer on Government Regulation of Railway Rates, pp. 191, 220; McPherson on Railroad Freight Rates, 68, 70, 73, and 118-119; New York Produce Exchange v. Baltimore & O. Rd. Co. et al. (1898), 7 I. C. C. R., 612; and particularly Re Differential Freight Rates (1905) 11 I. C. C. R., 13). It might be that laws which restrict the free currency of bills of lading would be a factor in determining a choice of ports through which to market the great staple commodities by means of drafts with order bills of lading attached, as in the regular practice. This is a matter for the careful consideration of the people of the State of New York in the event that the other States in which the above enumerated cities are located adopt the bills of lading act with the generally accepted definition of value.

Mr. Elkus in his letter says:

"Our clients have found, to their cost, that under the extension of the credit system of doing business, and the loose immigration laws which have turned loose upon this community some of the most unprincipled and brightest minds in Europe trained in every sort of business chicanery, a mercantile class has arisen which is absolutely devoid of business honor, and aided by attorneys of similar antecedents and equal lack of principle, seeks only to keep within the letter of the law and avoid criminal punishment."

If this be a condition local to New York City, your committee is convinced it does not prevail in the rest of the country.

Your committee hopes that the New York Merchants Association and Mr. Elkus upon carefully reexamining the whole subject, will support the present definition of "value" contained in the uniform bills of lading act.

¹ The four (4) instances suggested by Mr. Elkus are as follows:

1. An old and long outlawed debt.
2. A claim for damages by reason of negligence.
3. The duty to pay alimony.
4. The duty to support an aged parent.

² Section 51 in the final draft.

XV. ATTITUDE OF HOUSE.

A suggestion has been made, ostensibly with the purpose of influencing this committee, that the House is now in favor of the Clapp-Stevens as against the Pomerene bill. I do not believe that the members of the House will commit themselves against the Pomerene bill when they come to weigh the relative merits of the two bills, and the further fact that the Pomerene bill has already been enacted in nine States and has had the almost universal indorsement of the commercial organizations and numerous classes of shippers. The chairman of this committee has already announced that he has no pride of opinion as to the bill bearing his name, and from what we all know of Mr. Stevens of the House, we are quite sure that he has no pride of opinion, and that he will give his support to a measure advocated and indorsed by all commercial interests and demanded by all commercial interests, rather than to one merely propounded by one interest affected, to wit, the bankers. The American Bankers Association at one time advocated a short State bill prepared by them substantially the same as the Clapp-Stevens bills, and then withdrew their indorsement thereof and unanimously indorsed the Pomerene bill as a State measure.

Every speaker before this committee has expressed an opinion that the Pomerene bill is the superior measure with the solitary exception of Mr. Page, whose chief grievance seems to be against the definition of value, because the New York Merchants Association desires to stick to *Coddington v. Bay*, decided in 1821. A few speakers have expressed indifference as to which bill should be reported out. The Clapp-Stevens bill is distinctly a bankers bill touching but two points of vital importance to the bankers. The Pomerene bill is a comprehensive measure touching many matters of vital importance to shippers and receivers as well as the bankers, which will be given a single rule of conduct enforceable in the Federal courts, instead of a national and international instrument of commerce, slightly touched by Federal law and ever open to shifting and conflicting views of the courts and legislatures of 45 States.

The Pomerene bill has been distinctly indorsed by the following:

The Ohio Shippers Association (record, p. 100).

The National Industrial Traffic League, representing over 200 organizations, with approximately 20,000 members (record, pp. 164, 169), from some 80 cities as appears at said pages of the record.

Peoria Board of Trade, as per telegram March 14, 1912.

Commercial Club of St. Joseph, Mo., as per letter March 12, 1912.

Hay & Grain Producers & Shippers Association of Northwestern Ohio, as per letter March 13, 1912.

Ohio Grain Dealers Association, as per letter of March 13, 1912.

Chicago Association of Commerce with over 4,000 members, as per statement Cornelius Lynde at this day's hearing.

Transportation Department of the Board of Trade of Chicago, as per statement Mr. W. N. Hopkins at this day's hearing.

Toledo Produce Exchange, as per statement Mr. Henry Goeman at this day's hearing.

Grain Dealers National Association, with 2,000 dealers in 31 States and the District of Columbia, as per statement Mr. Henry Goeman at this day's hearing.

Minneapolis Traffic Association, as per statement Mr. Hugh E. White at this day's hearing.

St. Paul Association of Commerce, as per statement Mr. Hugh E. White, this day's proceedings.

XVI. IN CONCLUSION.

The Clapp-Stevens bills are distinctively bankers' bills to reach two evils, specially desired to be remedied by the bankers as affecting their special interests. They are measures of expediency and still leave a national and international instrument of commerce, subject to the conflicting laws of various States. It will be a fruitful source of litigation, leaving as it does undefined the meaning of "acquired," "value," "good faith," etc.

The Pomerene bill is nobody's bill, but fills a long-felt want of no special class but of each and every class of shippers, of each and every class of receivers, of the bankers and is a fair measure of justice to the railroads, and its principles and comprehensive nature has already been indorsed by the commissioners on uniform State laws from nearly every State in the Union. The American Bankers' Association and the American Bar Association, as a good State measure.

This committee should give heed to no one's single commercial interests, but to the wishes of all the diversified commercial interests. It should legislate in no hearted way, but comprehensively. This, though, was well expressed by Senator Newlands, March 7, 1910. (Senate Calendar No. 292, 61st Cong., 2d sess., Report No. 355, Part 3, p. 29), as follows:

The States being divested themselves of the power to regulate interstate commerce and having vested it in the Nation, have a right to demand that the Nation should exercise this power in the fullest and most comprehensive way for the general welfare. Thus far the Nation has exercised its power in a lame and halting fashion, and so abuses have sprung up which the States are powerless to control and which the Nation, whose jurisdiction is as broad as interstate commerce itself, can alone correct.

Senator Newlands had previously expressed the same views as per same document, page 31, as follows:

I believe that this is the time for full and comprehensive legislation.

What Senator Newlands said clearly points the way to reporting out the Pomerene bill in preference to the Clapp-Stevens bills.

The CHAIRMAN. The following letter from ex-Senator Charles J. Faulkner, attorney at law, Washington, D. C., will be inserted in the record:

WASHINGTON, D. C., *March 19, 1912.*

HON. MOSES E. CLAPP,
United States Senate, Washington, D. C.

MY DEAR SENATOR: Under authority granted at the meeting of your committee on the 15th instant, I beg leave to submit some objections to amendments offered by the propounders of the bills S. 957 and S. 4713.

The amendments offered by Prof. Williston and Mr. Paton are offered to S. 957, which reprint of that bill laid before your committee contains all the amendments which were concurred in and reported to your committee at the end of the last regular session.

The first amendment offered by Mr. Paton to S. 957, on page 2, immediately after C, in paragraph 3, inserts, "unless issued for shipment to a foreign country."

This is not objectionable, as the first section makes the law apply by amendment to foreign bills of lading for export to foreign countries, but we feel that section B, on page 2, should be amended, as that section prohibits the delivery of the property unless the original order bill of lading, properly indorsed, shall be surrendered. This would not be necessary but for the second amendment suggested by Mr. Paton, and

were respectfully protest against its adoption. It requires these export bills of lading to be in sets, which is a technical term meaning original. If this second amendment should be adopted by the committee, however, it would be necessary to put a provision in clause B, on page 2, authorizing the surrender of the property upon the delivery of any one of the originals of the export bills and declare the others canceled.

The second amendment proposed by Mr. Paton is to insert after the word "shall," on page 3, line 1, "except where bills of lading for shipment to a foreign country are issued in sets or parts."

This means in commercial language that these sets or parts are all originals, and we object to the insertion of this clause, as it is not necessary. Originally these foreign bills were issued in sets, all of them being originals. This resulted from the dangers of the sea and the possible loss of the bill of lading by the wrecking of the ship. Conditions have now changed. In moving the cotton crop during the last two years but one original was issued, although a number of duplicates were, of course, used. There was no difficulty in moving these crops under this arrangement, nor was there any objection by foreign bankers. We think it would be unwise without additional provisions protecting these sets of originals to adopt the amendment suggested.

He suggests amendments on page 4, at the end of section 4, by adding the following: "But the carrier, when requested and given reasonable opportunity to examine and verify the contents of any car, shall not insert in a bill of lading issued for the goods therein the words 'shipper's load and count' or other words of like purport."

We respectfully request the committee to reject this amendment, as it will necessarily lead to dispute and litigation: First, as to whether the carrier was requested; second, whether he had reasonable opportunity to examine and verify the contents of any car.

In many instances, even if such a request were made and opportunity given, it would be impossible to verify the count or the contents of a car after it was loaded, it being a physical impossibility. Again, no shipper would accept a bill of lading with that indorsement unless it were true.

Again, the object of this bill is to stop litigation, not to increase it, and the commercial interest demands, from the standpoint of necessity, the right to load and count its shipments. The responsibility of the road can be easily obtained, and this memorandum of the bill of lading omitted by the shipper bringing his goods to a freight station and delivering them to the road, when it must then assume the responsibility for the load and count. These spur tracks, belt lines, and independent lines connecting with the belt lines, are used by shippers to load their cars at their factories to avoid the cost of hauling to the transportation line, and they are additionally compensated for this service by less rates by the carload than by less-than-carload rates.

The next amendment suggested by Mr. Paton is to add at the end of section 6, after striking out the words "refusal to deliver," the following:

"Provided, That in such case due notice be given to the carrier, to the consignee, or to the party, who, according to the terms of the bill of lading, is to be notified of the arrival of the goods at their destination."

We think the word "shall" should be inserted between the words "notice" and "be." We urge no objection to this amendment.

The objection urged by Mr. Lynde to the provision that a carrier may insert in a bill of lading issued by him, "any other terms and conditions" is not well taken. This is an absolutely necessary provision to embrace the conditions found on the back of a bill of lading after the passage of such a measure as this, and the shipper is fully protected by the language of the act which provides that these terms or conditions shall "not be inconsistent with the provisions of this act, or otherwise contrary to law or public policy."

It is further suggested that where the shipper makes the load and count, that the carrier should be responsible for improper loading. This is so unjust and inequitable that we shall suggest no further reason for its rejection.

Respectfully submitted.

CHAS. J. FAULKNER.

The CHAIRMAN. The following letter and memorandum from Col. Alfred P. Thom, of general counsel, Southern Railway Co., will be inserted in the record:

WASHINGTON, D. C., March 19, 1912.

Hon. MOSES E. CLAPP,
United States Senate, Washington, D. C.

DEAR SIR: In the hearings in respect to bills of lading had before the Interstate Commerce Committee of the Senate, an effort has been made to put into the record

certain statements from the evidence of one J. W. Knight in which he undertook to say, in an indefinite kind of manner, that he had had some conversation with Mr. J. W. Hunter, division freight agent of the Southern Railway Co., during which Mr. Hunter authorized him to issue bills of lading for cotton and to sign the name of the agent of the company to them. I do not think that the hearings before your committee is an appropriate form in which to try the merits of an existing and controverted lawsuit, and, therefore, I shall not attempt here to go into the details of this matter, nor do I imagine your committee desires to encumber its record with an investigation into this case.

It is proper for me to say, however, that the committee should bear in mind that the evidence which was read before it from Mr. Knight was given by him in the course of a prosecution against him by the United States Government and in an effort to secure his own acquittal of a criminal charge, and for me to say further, that all his statements, so far as they seek to involve this company, are emphatically denied by Mr. Hunter, with whom he alleges the conversation took place. There has been no opportunity as yet to develop this matter in court on behalf of the Southern Railway Co., but we are entirely confident that all the allegations made by Mr. Knight, as quoted before your committee, will be abundantly disproven when the opportunity offers.

I would like also to add, in respect to the evidence quoted before your committee from the suit of W. S. Lovell, trustee, *v.* Henry Hentz & Co., to which suit Southern Railway Co. was not a party, that none of the transactions in respect to this cotton, and none of the telegrams or the letter quoted in the record, came to Mr. Hunter's attention until April 16, 1910—several days after the telegram of April 13—the letter of April 8 and the telegrams of April 13, being handled, during Mr. Hunter's absence, by an inexperienced clerk who had been in his employment only about six weeks. As soon as Mr. Hunter learned of the transaction, which was on the 16th of April, 1910, he reported the situation to his superior officers, and immediately an investigation was started and such information given to Henry Hentz & Co. by representatives of the Southern Railway Co. as resulted in the disclosure of the methods of Knight, Yancey & Co. and the failure of that firm on April 20. In other words, the very transactions referred to in the quotations from the testimony in the suit of Lovell, trustee, against Henry Hentz & Co. resulted, through the action of Southern Railway Co., in the disclosure of these serious irregularities of Knight, Yancey & Co.

Moreover, it is proper for me to state that a large amount of testimony has been taken in the cases to which the Southern Railway Co. is a party, extending over a large area of Europe and in this country, and I think it is universally admitted that not one word has been developed connecting the Southern Railway Co. improperly with any of these irregularities.

Yours, very truly,

ALFRED P. THOM,
G. C.

Memorandum by Alfred P. Thom.

In connection with the effort now being made before the Interstate Commerce Committee of the Senate to extend the liability of carriers on bills of lading, I would ask the following to be considered:

First. There can be no doubt, under the Friedlander case (130 U. S.) and other similar cases, that the proposal is to largely increase the present standard of responsibility of carriers on bills of lading issued by their local agents. This is not only true as a matter of law, but the slightest consideration would convince anyone that it is true also in a very practical sense. The present law does not make the carrier responsible unless it has actually received the goods. The proposal is to make the carrier responsible when his agent signs the bill of lading, whether the goods have been received or not. It is manifest from this that the whole credit of the carrier can be pledged by any agent on its many thousands of miles of road who signs and issues a bill of lading. The liabilities which may grow out of this are of course immense.

It is no answer to say that heretofore, when the agent had no authority to pledge the credit of the company, instances of losses through bills of lading issued by the agent have not occurred on the lines of some of the carriers. As the agent could not pledge the credit of the company, there was in this state of the law small temptation to induce the agent to dishonestly issue such bills of lading, inasmuch as they would be worthless if issued. If, however, the credit of the company is by law put behind the dishonest acts of such agent, an immense inducement is held out for collusion between dishonest shippers and corruptible agents whereby they may collusively trade upon the credit of the carrier. It takes no argument to show that this is a risk

of very serious proportion and which no one would be willing lightly to assume. It would seem to follow, as a matter of natural justice, that a rate which is just as a compensation for the carrier's service when this responsibility is not imposed upon it would be too little if this responsibility is now superadded. If the business of the country demands such a safeguard, then the carrier should receive reasonable compensation for the additional facility which it affords. That reasonable compensation should be first fixed by it, as it does its other charges, and should be subject to the control of the Interstate Commerce Commission as the carrier's other charges are.

Second. The right to a difference in these charges ought to be recognized in the law itself. It will be remembered that it has been shown before the committee that about 98 per cent in number of the bills of lading on which commerce moves do not go into bank at all, and that only 2 per cent in number do go into bank. Of course the 2 per cent in number constitutes a good deal more than that percentage of the values involved.

The 98 per cent of shippers who do not desire to carry their transactions through the bank realize that all they have to do in order to get the full protection of the carrier's responsibility is to actually deliver the goods to the carrier. If they deliver the goods the carrier is as responsible as it could be made under the proposed law for goods not delivered. These 98 per cent, therefore, not desiring any such protection, and realizing that all they have to do to get the carrier's full responsibility is to honestly deliver the goods, should not be charged for the additional responsibility which the consignees and bankers seem to want in respect to bills of lading that go through the bank. It would seem, therefore, that this very large class of shippers—by far the greatest numerically—should have their rights protected by enabling them to retain the present form of bill of lading at existing rates or rates based upon existing liabilities. This should be done in the interest of the shippers. They should not be forced into the same class as shippers who deal through banks and whose consignees and bankers desire a larger measure of responsibility on the carrier as a protection against the dishonesty of their own shippers. It would seem, therefore, that there is no way of protecting the very large number of shippers who do not desire to go into the banks with this bill of lading, except to make two classes of bills of lading, one such as exists now, with the present standards of responsibility, and the other the guaranteed bills of lading which will carry the carrier's responsibility for the act of its agent, whether the goods are received or not.

It would be manifestly unfair to give the carrier only the same compensation for the guaranteed bills of lading as it receives for bills of lading which carry only the presently existing responsibilities. It would manifestly be unfair to the great number of shippers who are satisfied with the present system and who do not go into the bank, to elevate their charges to cover the additional risk which it is proposed to put upon the carrier by these bills. In order to adequately recognize the rights and protect the interests of the great mass of shippers, on the one hand, and of the carriers on the other, therefore, it would seem necessary to distinguish between different classes of bills of lading, making them into two classes, and to recognize the fact that there should be a reasonable charge for the guaranteed bill of lading over the unguaranteed, and to protect the public in respect to the amount of this charge by placing it under the control of the Interstate Commerce Commission. If there is but one class of bills of lading permitted, as the advocates of these bills urge, and if the amount of charges of the carrier are left finally to be determined by the Interstate Commerce Commission, that commission must in the nature of things recognize that there is a greater responsibility put upon the carrier and must permit a larger charge. If there is but one class of bills of lading the result of this upon the great mass of shippers would be to increase the cost of the service to them beyond what it would naturally and properly be and this for the benefit of the other class of shippers, which desires to utilize its bills of lading in bank. On the other hand, if the carriers are not allowed to get anything for the additional risk imposed on them by law, then a manifest injustice is done to the carriers, because they would be required to assume very seriously increased risks without any increased compensation. This is not only contrary to the usual course of business but is contrary to natural right and justice.

(The committee thereupon adjourned.)

ADDITIONAL MATTERS SUBMITTED BY MR. FRANCIS B. JAMES, OF LIT-
TLEFORD, JAMES, BALLARD, FROST & FOSTER, OF CINCINNATI, OHIO,
AND WASHINGTON, D. C.

Pursuant to permission granted at the hearing of the committee March 15, 1912, Mr. Francis B. James submitted the following copy of a letter addressed by him to each member of the Committee on Interstate Commerce of the United States Senate, to wit:

WASHINGTON, D. C., *March 21, 1912.*

Hon. _____,

United States Senator, Washington, D. C.

MY DEAR SENATOR: I have now gone over Senate bill 4713 (Pomerene bill), on bills of lading in interstate and foreign commerce, in light of all the criticisms, and made various amendments therein, indicated in red ink. It will be readily seen that even in the light of these amendments the bill is shown to be absolutely perfect, and will be explained as follows:

Page 2, lines 20-24, are omitted because that matter is a mere illustration of the subject matter in line 19, page 2. It is therefore in no sense an amendment of substance.

Page 10, insert between lines 15 and 16, new sections 23 and 24. These two new sections are in no sense an amendment of section 25, but cover an entire new subject matter.

Page 11, line 15, insert after the word "also" the words "subject to the provisions of sections 23 and 24." It is not absolutely necessary to insert this language, but it is wise, in view of the insertion of the new sections 23 and 24.

Page 13, line 4, insert the word "themselves" after the word "goods." This insertion is not necessary, but will remove any captious criticisms. Legislation at this state of the bill is cheaper than litigation thereafter.

The striking out of the matter on page 15, line 25, and page 16, line 1; page 16, lines 12-14; page 17, lines 21-25; all of pages 18 and 19; and lines 1-4 on page 20 will satisfy the most captious critics on constitutional grounds. As the matter stricken out deals with an entirely different subject matter than the body of the bill, they can go out and leave the bill absolutely perfect.

Striking out lines 14-17, page 23, meets the suggestion of Senator Cummins that it would be indelicate to indicate to the Supreme Court of the United States that that body should follow State decisions.

Nine States have enacted the Pomerene bill as a State measure, and the Pomerene bill as a State measure received the unanimous approval of bankers, carriers, shippers, and receivers. Not only the unanimous approval of shippers and receivers but of each and every class of receivers and shippers. It is in no sense class legislation, but absolutely fair to the four interests involved and clearly defines their respective rights, duties, and obligations.

The Clapp-Stevens bills were propounded by one special interest, to wit, the bankers, and meets two evils particularly affecting the bankers.

The overwhelming testimony before the Committee on Interstate Commerce of the United States Senate was in favor of the Pomerene bill.

If we are to have legislation on this subject, we should have comprehensive legislation, clear, accurate, and defined in the well-chosen language of the law merchant and thereby minimize litigation.

If we are to have an instrument of interstate and foreign commerce, it should be so comprehensively legislated on by Congress that all rights, duties, and obligations can be enforceable as a part of the Federal law, and we should not have an instrument covered upon but two points by Federal law and the other multifarious rights, duties, and obligations in reference thereto left to the conflicting decisions and statutes of 45 States in the Union.

Very respectfully,

FRANCIS B. JAMES.

Accompanying said letter was a completed bill embodying the matters referred to in said letter as follows, to wit:

A BILL Relating to bills of lading in commerce with foreign nations and among the several States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That bills of lading issued by any common carrier for the transportation of goods from a place in a State to a place in a foreign country or from a place in one State to a place in another State shall be governed by this act.

SEC. 2. That every bill must embody within its written or printed terms—

- (a) The date of issue;
- (b) The name of the person from whom the goods have been received;
- (c) The place where the goods have been received;
- (d) The place to which the goods are to be transported;
- (e) A statement whether the goods received will be delivered to a specified person or to the order of a specified person;
- (f) A description of the goods or of the packages containing them which may, however, be in such general terms as are referred to in section twenty-five; and
- (g) The signature of the carrier.

A negotiable bill shall have the words "order of" printed thereon immediately before the name of the person upon whose order the goods received are deliverable.

A carrier shall be liable to any person injured thereby for the damage caused by the omission from a negotiable bill of any of the provisions required in this section.

SEC. 3. That a carrier may insert in a bill issued by him any other terms and conditions: *Provided*, That such terms and conditions shall not be contrary to law or public policy.

SEC. 4. That a bill in which it is stated that the goods are consigned or destined to a specified person is a nonnegotiable or straight bill.

SEC. 5. That a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is a negotiable or order bill. Any provision in such a bill that it is nonnegotiable shall not affect its negotiability within the meaning of this act.

SEC. 6. That negotiable bills issued in a State for the transportation of goods to any place in the United States on the continent of North America, except Alaska and Panama, shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to anyone who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts: *Provided, however*, That nothing contained in this section shall be interpreted or construed to forbid the issuing of negotiable bills in parts or sets for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries, or to impose the liabilities set forth in this section for so doing.

SEC. 7. That when more than one negotiable bill is issued in a State for the same goods to be transported to any place in the United States on the continent of North America, except Alaska and Panama, the word "duplicate," or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every such bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill: *Provided, however*, That nothing contained in this section shall in such case for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries be interpreted or construed so as to require the placing of the word "duplicate" thereon, or to impose the liabilities set forth in this section for failure so to do.

SEC. 8. That a nonnegotiable bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgements of an informal character.

SEC. 9. That the insertion in a negotiable bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

SEC. 10. That except as otherwise provided in this act, where a consignor receives a bill and makes no objection to its terms or conditions at the time he receives it, neither the consignor, nor any person who accepts delivery of the goods, nor any person who seeks to enforce any provisions of the bill, shall be allowed to deny that he is bound by such terms and conditions so far as they are not contrary to law or public policy.

SEC. 11. That a carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is negotiable, by the holder thereof, if such a demand is accompanied by—

- (a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;
- (b) An offer in good faith to surrender, properly indorsed, the bill which was issued for the goods if the bill is negotiable; and
- (c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.

SEC. 12. That a carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

- (a) A person lawfully entitled to the possession of the goods; or
- (b) The consignee named in a nonnegotiable bill for the goods; or
- (c) A person in possession of a negotiable bill for the goods, by the terms of which the goods are deliverable to his order, or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.

SEC. 13. That where a carrier delivers goods to one who is not lawfully entitled to the possession of them the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery; or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

A request for information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request for information, and must be given in time to enable the officer or agent to whom it is given, acting with the reasonable diligence, to stop delivery of the goods.

SEC. 14. That except as provided in section twenty-seven, and except when compelled by legal process, if a carrier delivers goods for which a negotiable bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto.

SEC. 15. That except as provided in section twenty-seven, and except when compelled by legal process, if a carrier delivers part of the goods for which a negotiable bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered, with a description, which may be in general terms, either of the goods or packages that have been so delivered, or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

SEC. 16. That any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

SEC. 17. That where a negotiable bill has been lost or destroyed a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction; and upon the giving of a bond, with sufficient surety to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill remaining outstanding, the court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees.

The delivery of the goods under an order of the court as provided in this section shall not relieve the carrier from liability to a person to whom the negotiable bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

SEC. 18. That a bill upon the face of which the word "duplicate" or some other word or words, indicating that the document is not an original bill, is placed plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an accurate copy of an original bill properly issued, but no other liability.

SEC. 19. That no title to goods or right to their possession, asserted by a carrier for his own benefit, shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.

SEC. 20. That if more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods, or as an original suit, whichever is appropriate.

SEC. 21. That if some one other than the consignee or the person in possession of the bill has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods either to the consignee or person in possession of the bill or to the adverse claimant until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

SEC. 22. That except as provided in the two preceding sections and in section twelve no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a nonnegotiable bill or by the holder of a negotiable bill against the carrier for failure to deliver the goods on demand.

SEC. 23. When goods are loaded by a carrier, such carrier shall count the packages of goods if package freight and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading "Shipper's load and count," or other words of like purport indicating that the goods were loaded by the shipper and the description of them made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

SEC. 24. When goods are loaded by a shipper, such carrier shall, on written request of such shipper, count the packages of goods if package freight and ascertain the kind and quantity if bulk freight, within a reasonable time after such written request, and such carrier shall not, in such cases, insert in the bill of lading "Shipper's load and count," or other words of like purport indicating that the goods were loaded by the shipper and the description of them made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

SEC. 25. That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the issuing of bills of lading, the carrier shall be liable to (a) the consignee named in a nonnegotiable bill or (b) the holder of a negotiable bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier or a connecting carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

If, however, the goods are described in a bill merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill, such statements, if true, shall not make liable the carrier issuing the bill, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also, subject to the provisions of sections twenty-three and twenty-four, by inserting in the bill the words "shipper's load and count," or other words of like purport, indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill.

SEC. 26. That if goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and a negotiable bill is issued for them, they can not thereafter, while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.

SEC. 27. That a creditor whose debtor is the owner of a negotiable bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which can not readily be attached or levied upon by ordinary legal process.

SEC. 28. That if a negotiable bill is issued the carrier shall have no lien on the goods therein mentioned except for charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or

incident to their transportation subsequent to the date of the bill, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.

SEC. 29. That after goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be negotiable.

SEC. 30. That a negotiable bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank.

SEC. 31. That a negotiable bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.

SEC. 32. That a bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A nonnegotiable bill can not be negotiated, and the indorsement of such a bill gives the transferee no additional right.

SEC. 33. That a negotiable bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.

SEC. 34. That a person to whom a negotiable bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

SEC. 35. That a person to whom a bill has been transferred but not negotiated acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is nonnegotiable, such person also acquires the right to notify the carrier of the transfer to him of such bill, and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a nonnegotiable bill the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified, and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods.

SEC. 36. That where a negotiable bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

SEC. 37. That a person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

(a) That the bill is genuine.

(b) That he has a legal right to transfer it.

(c) That he has knowledge of no fact which would impair the validity or worth of the bill.

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to transfer without a bill the goods represented thereby.

SEC. 38. That the indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

SEC. 39. That a mortgagee or pledgee, or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described.

SEC. 40. That the validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor, in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, or conversion.

SEC. 41. That where a person, having sold, mortgaged, or pledged goods which are in a carrier's possession and for which a negotiable bill has been issued, or having sold, mortgaged, or pledged the negotiable bill representing such goods, continues in possession of the negotiable bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

SEC. 42. That where a negotiable bill has been issued for goods no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

SEC. 43. That, except as provided in section forty-two, nothing in this act shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this act, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them.

SEC. 44. That any officer, agent, or servant of a carrier who, with intent to defraud, issues or aids in issuing a bill knowing that all or any part of the goods for which such bill is issued have not been received by such carrier, or by an agent of such carrier, or by a connecting carrier, or are not under the carrier's control at the time of issuing such bill, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

SEC. 45. That any officer, agent, or servant of a carrier who, with intent to defraud, issues or aids in issuing a bill for goods knowing that it contains any false statement, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

SEC. 46. That any officer, agent, or servant of a carrier who, with intent to defraud, issues or aids in issuing a duplicate or additional negotiable bill for goods in violation of the provisions of section seven, knowing that a former negotiable bill for the same goods, or any part of them, is outstanding and uncanceled, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

SEC. 47. That any person who ships goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable bill which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding one year, or by a fine not exceeding one thousand dollars, or by both.

SEC. 48. That any person who with intent to deceive negotiates or transfers for value a bill, knowing that any or all of the goods which by the terms of such bill appear to have been received for transportation by the carrier which issued the bill are not in the possession or control of such carrier or of a connecting carrier, without disclosing this fact, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

SEC. 49. That any person who with intent to defraud secures the issue by a carrier of a bill, knowing that at the time of such issue any or all of the goods described in such bill as received for transportation have not been received by such carrier or an agent of such carrier or a connecting carrier or are not under the carrier's control, by inducing an officer, agent, or servant of such carrier falsely to believe that such goods have been received by such carrier or are under its control, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

SEC. 50. That any person who with intent to defraud issues or aids in issuing a non-negotiable bill without the words "not negotiable" placed plainly upon the face thereof shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding five thousand dollars, or by both.

SEC. 51. That in any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

SEC. 52. (First) That in this act, unless the context or subject matter otherwise requires—

"Action" includes counter claim, set-off, and suit in equity.

"Bill" means bill of lading governed by this act.

"Consignee" means the person named in the bill as the person to whom delivery of the goods is to be made.

"Consignor" means the person named in the bill as the person from whom the goods have been received for shipment.

"Goods" means merchandise or chattels in course of transportation, or which have been or are about to be transported.

"Holder" of a bill means a person who has both actual possession of such bill and a right of property therein.

"Order" means an order by indorsement on the bill.

"Owner" does not include mortgagee or pledgee.

"Person" includes a corporation or partnership or two or more persons having a joint or common interest.

To "purchase" includes to take as mortgagee and to take as pledgee.

"Purchaser" includes mortgagee and pledgee.

"State" includes any Territory, District, insular possession, or isthmian possession.

"Value" is any consideration sufficient to support a simple contract. An antecedent or preexisting obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor.

(Second) A thing is done "in good faith" within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

SEC. 53. That the provisions of this act do not apply to bills made and delivered prior to the taking effect thereof.

SEC. 54. That this act shall take effect on the first day of January, one thousand nine hundred and thirteen.

The CHAIRMAN. The following letter from Mr. Colston will be placed in the record:

LOUISVILLE & NASHVILLE RAILROAD CO.,
Louisville, Ky., April 16, 1912.

HON. MOSES E. CLAPP,
*Chairman Committee on Interstate Commerce,
 United States Senate, Washington, D. C.*

DEAR SIR: In response to your letter of April 12, 1912, I have to-day wired you as follows:

"Upon my return from an extended trip I find your letter of April 12. Will write to-day."

The written statement which I desired to file on behalf of the Louisville & Nashville Railroad Co. in connection with the hearings before your committee on Senate bills 4713 and 957, relating to bills of lading, has not been previously forwarded for three reasons:

1. Because it was deemed desirable to look into the record in the case of *United States v. John W. Knight*, from which Mr. Richter quoted in part;

2. Because of professional engagements which prevented my earlier attention to the matter; and

3. Because of the advice contained in your letter of March 22, 1912, that as our answer does not necessarily go to the main issue there was no hurry about sending it.

As was indicated in the last paragraph of your letter of March 22, 1912, the question directly raised by the statement of Mr. Robert M. Richter before your committee on

March 15, 1912, does not relate to the matters under consideration in the hearings before your committee with reference to Senate bills 4713 and 957, and I do not believe that your committee is the proper tribunal before which to argue irrelevant questions now elsewhere in litigation. I reply to the statements made by Mr. Richter merely because I am unwilling that the erroneous and irrelevant conclusions stated by him should prejudice our interests in the real controversy with respect to the proposed bill-of-lading legislation.

In the first place, the attention of the committee is respectfully directed to the fact that although Mr. Phelan Beale, in his telegram of March 1-2, 1912, which appears at page 207 of the hearings, with respect to bills of lading, requested time in which to obtain certified copies of the testimony in support of conclusions and statements previously made by him, and said that he was willing to rest his case on his charges and his ability to prove the same substantially; his representative, Mr. Richter, in subsequently making his statement before the committee (record of hearings, p. 255, et seq.), instead of presenting the certified copies of the testimony, again indulged, as Mr. Beale had previously done, in stating his conclusions as to the effect of the testimony.

Mr. Richter said (record of hearings, p. 259):

"It would encumber the record if I read all of the testimony supporting my contentions. Suffice it to say that the testimony shows that the railroads were fully aware of the signing by Knight of bills of lading with the name of the agent when no goods had been delivered, and that the agents of the railroads, when apprised of the condition of affairs, instead of at once repudiating these bills actually ratified them by sending false messages to the holders of the bills to the effect that the goods were on their way, when as a matter of fact no goods were in the possession of the railroad."

We assert that the testimony does not fairly admit of any such construction as that stated by Mr. Richter, and submit that as this was the very question with respect to which Mr. Beale's statements had been challenged, Mr. Richter would have done better if he had introduced the record of the testimony and have permitted the committee to draw their conclusions instead of stating as the effect of the testimony that which was directly controverted.

I quote below from the testimony given by Mr. J. A. Bywater and Mr. J. W. Hunter in the criminal trial of Mr. John W. Knight:

EXTRACT FROM TESTIMONY OF MR. J. A. BYWATER, GIVEN IN THE CASE OF UNITED STATES *v.* JOHN W. KNIGHT, IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHEASTERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA, AT HUNTSVILLE, ALA., BEGINNING DECEMBER 6, 1911, BEFORE W. I. GRUBB, J., AND A JURY.

[From transcript, pp. 686-688.]

"Q. Now, in this conversation you had with Mr. Knight, either at Birmingham or Decatur—both were at Birmingham?—A. The original conversation in respect to this arrangement was at Decatur.

"Q. In which he explained the advantage of having cotton dated at Memphis?—A. That is the way he put it to me; he could sell more cotton to Liverpool if he could sell through Conway & Mallory.

"Q. In either one of these conversations in Decatur, or the two times you saw him at Birmingham, did he ever suggest to you the idea of you authorizing him to sign the agent's name to the bill of lading without the cotton being delivered to the road?—A. No, sir.

"Q. Did he ever propose a thing of that kind to you at any time?—A. No, sir.

"Q. Did you ever authorize him at any time to do a thing of that kind?—A. No, sir.

"Q. Would you have had any such authority as that?—A. No, sir.

"Q. When did you learn for the first time that Mr. Knight had signed the name of your local agent at Selma and at Decatur to bills of lading for which no cotton had been delivered; when did you first learn that?—A. I do not recall the dates exactly. It was somewhere in April, 1910.

"Q. Was that about the time of the failure?—A. It was after the failure.

"Q. About how long after the failure?—A. It was probably a week or so. The first I knew of it our traffic manager was at Pensacola and met Mr. M. J. Sanders of the Leland Line, and he notified him that something had occurred, and he wired me at Louisville about it and wanted to know if we had issued any bills of lading for cotton that had not been received, and I did not know exactly what he meant by it and awaited his return to Louisville. I think it was a few days after that the whole thing came out.

"Q. You got your first information from whom?—A. C. B. Compton.

"Q. At Pensacola or Mobile?—A. At Louisville.

"Q. He got his information from what point—did he tell you he got his information? (Defendant objects to the question. The court sustains the objection.)

"Q. That was about how many days before Knight went to the wall?—A. I should say about a week. I have not looked over any records, but that is the best of my recollection, about a week.

"Q. In the fall of 1905, I will ask you if Mr. Knight at any time during that fall, or any other time, informed you that his partners, or any person connected with his firm, while he was absent in Europe, had issued bills of lading for cotton that had never been delivered to your road amounting to 1,700 bales?—A. No, sir.

"Q. Did you ever hear anything of that kind before?—A. No, sir.

"Q. Did you ever hear of it before you went on the stand?—A. No, sir.

"Q. Now, on the stand is the first time you ever heard of such a thing?—A. The first time I ever heard of it.

"Q. Did he ever at any time tell you that his partners or anybody connected with his firm had done a thing of that sort?—A. No, sir."

[From transcript, p. 709.]

"Q. Now, here is a letter. I will ask you to read that. It is of date November 10, 1905?—A. Yes, sir; I signed that letter. I do not recall to my memory just what it was.

"Q. Did that have anything to do with bills of lading having been issued—were those difficulties occasioned by Knight, Yancey & Co. having issued bills of lading themselves without knowledge of your agent?—A. No, sir.

"Q. Altogether a different matter?—A. Yes, sir."

[From transcript, p. 716.]

"Q. In that conversation about antedating bills was there anything said by you and Mr. Knight over the phone about his signing bills of lading without the cotton being delivered and without the agent of the road knowing anything about it?—A. No, sir; absolutely nothing.

"Q. And either at that time or any other time did any such conversation ever take place between you and Mr. Knight?—A. No, sir."

EXTRACT FROM TESTIMONY OF MR. J. W. HUNTER, GIVEN IN THE CASE OF UNITED STATES V. JOHN W. KNIGHT, IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHEASTERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA, AT HUNTSVILLE, ALA., BEGINNING DECEMBER 6, 1911, BEFORE W. I. GRUBB, J., AND A JURY.

[From transcript, p. 59]

"Q. Do you know anything about those bills of lading; where they came from?—A. These?

"Q. Yes.—A. No, sir.

"Q. Did you ever authorize anybody to sign your name, or to issue them?—A. No, sir.

"Q. Do you know of any other employee of the Southern Railway Co. authorizing anything of the kind?—A. No, sir."

[From transcript, p. 73, cross-examination.]

"Q. Now, Mr. Hunter, as far back as 1906 and 1907, didn't you know that bills of lading had been issued by Knight, Yancey & Co. with your name signed to them?—A. No; I didn't know it."

[From transcript, p. 99, on redirect examination.]

"Q. You did not issue, or authorize the issuance, of bills of lading for cotton not received?—A. We issued no bills of lading until we had evidence that the cotton was loaded in our cars."

[From transcript, pp. 662-663, on rebuttal examination.]

"Q. The meeting at Birmingham—when did that occur; about when was that meeting?—A. I haven't the slightest idea. There were some rumored changes there about that time. I either got off the train and came out or went in the L. & N. station to take the train and met Mr. Knight and shook hands with him, and he said, 'I hear you are coming up here as assistant general freight agent,' and I said 'That is the first I knew of it.'

"Q. Did you have any business conversation with him on that occasion?—A. That is every word that was passed.

"Q. Is that the only time you met him in Birmingham?—A. In recent years?

"Q. Since 1905 or 1906?—A. I am pretty sure it is.

"Q. I will ask you if during that meeting or any other meeting that you may have had with him in the city of Birmingham if he told you that he had been authorized by the L. & N. to issue bills of lading himself without cotton actually being delivered to the road for the bills?—A. I did not catch the first part of your question.

"Q. I say, did he ever in a meeting in Birmingham or in any other meeting that you may have had with him in Birmingham, did he ever say to you that he had been authorized by the L. & N. to issue bills of lading himself?—A. As I have just stated, that was the only conversation I had with him since 1906 or 1907.

"Q. Did he ever, at Birmingham or anywhere else, until after this failure occurred, say to you that the L. & N. had authorized him to issue bills of lading?—A. He never told me that before or since the failure.

"Q. Since the failure I believe he did tell you he had issued some bills of lading?—A. He told me over the telephone that 'we foolishly made them up here.'

"Q. He never did tell you that he was authorized by the L. & N. to issue bills of lading himself?—A. No, sir."

The absurdity of the inference which Mr. Richter (record of hearings, pp. 260-263) seeks to torture from Mr. Bywater's letter of November 10, 1905, that authority had been given to Knight's firm to issue false bills of lading, is apparent from a reading of the communication itself. The letter plainly refers to a question of rates, and Knight, Yancey & Co. were informed that with respect to the 500 bales offered on contract B-277 not less than 74 cents from Montgomery would be accepted. But we have Mr. Bywater's definite statement, as quoted above from page 709 of the transcript of the record in the Knight case, that the letter in question did not have anything at all to do with the issuing of bills of lading.

I shall not consume the time of the committee in pointing out other errors and inconsistencies in the conclusions offered as facts by Messrs. Beale and Richter. The committee will, of course, bear in mind that the statements made by Mr. Knight were made by him in an effort to escape conviction on a criminal charge, and Mr. Knight at least admits that he did sign, or cause to be signed, bills of lading for property not delivered to the railroad company. Messrs. Hunter and Bywater were not under trial and gave their testimony as disinterested witnesses.

The fact to be impressed upon the committee is this, that the gentlemen who have, in connection with the hearings on Senate bills 4713 and 957, urged the necessity of such legislation because of the southern cotton frauds, are urging an evil which would not be cured, but would, in fact, be aggravated by the legislation proposed, as southern cotton frauds arose from the issue of forged bills of lading, and were made possible by the carelessness of the banks in dealing with their customers in this regard. The proposed legislation with respect to the issue of bills of lading would not in anywise prevent the issue of forged bills, but would, in fact, tend to make the banks more careless and put a premium upon dishonesty.

Leaving now the irrelevant discussion as to the southern cotton forgeries, I would respectfully recapitulate the reasons heretofore urged by me before the committee why the proposed bill-of-lading bills should not be enacted into law. These reasons are:

1. That there is no necessity for the proposed legislation;
2. That the bills do not reach the real evil, which relates to the issue of forged bills of lading;
3. That the legislation proposed in the bills would, in fact, increase the evil and put a premium upon crime;
4. That the bills seek to throw upon carriers a responsibility which should be borne by the bankers; and
5. That the bills do not provide for compensation which should be allowed the carriers if there exists any commercial necessity for the change in the law of responsibility as to bills of lading.

As to the first point, it is sufficient to point out to the committee that practically none of the instances of loss brought to the committee's attention relate to the issue of bills of lading by authorized agents of the carriers in territories where the principle announced in the Friedlander case is observed. The greater part of the losses occurred either in connection with forged bills of lading or in connection with bills of lading for shipments in jurisdictions in which carriers are held responsible for bills of lading issued by their agents where the property has not been received.

With respect to the second point, it is submitted that the record shows clearly that whatever distrust may have arisen on the part of foreign bankers or foreign consumers of our products and whatever substantial demand for safeguarding our bills of lading

may have arisen have been in connection with the issue of forged bills of lading which were not properly scrutinized or safeguarded by the initial banks.

As to the third point, it is evident that the proposed legislation would enable an unscrupulous agent to more readily realize upon bills of lading issued by him for the purpose of defrauding his company, and would consequently constitute a premium upon crime.

As to the fourth point, it is clear that while the banking interests, which are proposing this legislation, insist that they are desirous of making a bill of lading a more valid and substantial thing, they are in fact attempting, at least in the Pomerene bill, to relieve themselves of all responsibility and to discredit the value of a bill of lading accordingly, while section 35 of the Pomerene bill (S. 4713) takes good enough care that the person who negotiates or transfers for value a bill by indorsement or delivery, including one who assigns for value a claim secured by a bill, shall warrant that the bill is genuine, that he has a legal right to transfer it, that he has knowledge of no fact which would impair the validity or worth of the bill, and that he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract with the parties had been to transfer without a bill the goods represented thereby, and thus protects the initial banker in every way. When the first banker comes in the warranty stops and the bankers take the bill of lading merely as a pledge or pignus bailment. The bankers seek to avoid all responsibility and to be treated merely as bailees. If it is desired that a bill of lading be made a more dependable thing, the bankers should be made to bear at least their part of the responsibility and it should be provided that a mortgagee or pledgee, or other holder of a bill for security, who demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall be deemed by so doing to represent or warrant the genuineness of such bill. There is another matter of responsibility for the southern cotton losses, which apparently has not been drawn to the attention of the committee, and that is in connection with the practice of insurance companies to furnish signed blank certificates of insurance. Under such certificates of insurance the insurance companies receive pay for insuring property that has not been shipped, and such action tends to assist in the collection of money on fraudulent bills of lading. What is needed is a reform in the methods of bankers, brokers, and insurance companies. Additional legislation affecting the liability of carriers is not necessary.

With reference to the fifth point, it seems clear that if there really exist the dangers pointed out by the proponents of this bill-of-lading legislation, and carriers under the decision in the Friedlander case have not been subjected to any of these dangers, and the present-day commercial necessities demand that such responsibility be assumed by the carriers, then the carriers should unquestionably be compensated for their increased liability. If the legislation proposed would not place any additional burden or responsibility on the carriers, then the legislation is not necessary. If the legislation proposed would place additional responsibilities on the carriers, the carriers should be compensated for the added burden.

Very respectfully,

W. A. COLSTON,
Commerce Attorney.

The CHAIRMAN. The following letters and telegrams will be placed in the record:

[Telegram.]

KANSAS CITY, MO., *March 14.*

HON. MOSES E. CLAPP,
Washington, D. C.:

The importance of legislation requiring uniform bills of lading wherein the integrity of lading is preserved being of utmost importance, we respectfully request you to give careful consideration to bills introduced.

ED BIGLEOW,
Secretary Board of Trade.

[Telegram.]

MINNEAPOLIS, MINN., *March 22, 1912.*

HON. MOSES E. CLAPP,
Washington, D. C.:

We trust that your committee will favor the Stevens-Clapp bill. This will best serve the milling interests of the United States.

WASHBURN-CROSBY Co.

[Telegram.]

MINNEAPOLIS, MINN., March 19.

HON. MOSES E. CLAPP,
Washington, D. C.:

We sincerely hope you will favor the Pomerene bill, Senate file 4713, as the fairest measure pending dealing with the status of bills of lading.

MINNEAPOLIS STEEL & MACHINE Co.

NEW YORK, March 21, 1912.

HON. MOSES E. CLAPP,
*Chairman Senate Committee on Interstate Commerce,
 Washington, D. C.*

DEAR SIR: If, as we indirectly understand, your committee is about to decide whether to adopt the so-called Stevens-Clapp bill or Pomerene bill, relating to liability of carrier for the acts of his agent in issuing bills of lading, we take the liberty of urging you to adopt the Stevens-Clapp bill, as, in our opinion, there is no doubt whatever as to the constitutionality of all of the provisions of the Stevens-Clapp bill, while on the other hand, we have doubts as to the constitutionality of some of the provisions of the Pomerene bill.

Such a bill as the Stevens-Clapp bill is urgently needed by all of the flour millers whom we represent, most of whom are engaged in interstate and foreign commerce.

Without troubling you with the names of the concerns we represent as export agents, we beg to advise that we do represent about 75 per cent of the merchant millers of this country, who do an export business as well as a large domestic business.

Yours, faithfully,

F. H. PRICE & Co.

HAMMOND, IND., April 2, 1912.

HON. MOSES CLAPP,
*Chairman Interstate Commerce Committee, United States Senate,
 Washington, D. C.*

DEAR SIR: We beg to offer the following suggestions relative to the issuance of railroad bills of lading.

It is customary and convenient for shippers to make out their own bills of lading for the railroads to sign. All industries doing business in carlots do this in connection with their regular office manifolding, so that these bills of lading are made out the same time the invoices are.

To safeguard bills of lading, we believe that the simplest and best way would be to validate them with a stamp in the same manner that railroad tickets are stamped when purchased. Almost every railroad office has such a stamp and they could, if necessary, use the same one that is used for stamping railroad tickets, which shows the name of the company, the date, and should show the name of the agent. It could be made a misdemeanor to counterfeit such stamps, and as the signature should correspond to the agent's name shown on the stamp, there would be no question as to whether the agent's name was a fictitious one. Now, when we receive a bill of lading from a thousand miles away signed by John Jones, agent, we can not know whether he is the agent or not, or whether it is a counterfeit; but if it is stamped in this manner there will be no question about it. If necessary, the railroad agents could use an embossing seal such as is used by notary publics.

It should also be necessary for carriers to insert in the bill of lading the freight rate on all carload shipments at least. On less than carlot shipments the question of the freight rate is not so important as the charges are relatively small. Purchasers of grain and other commodities are often defrauded by the omission of the freight rates. We were sufferers in one case where the railroad deliberately misquoted the rate and omitted placing the rate on the bill of lading, and their route's tariff rate actually was $5\frac{1}{2}$ cents more than all other routes. We purchased these bills of lading innocently and by this action on the part of the carrier in concealing the true rate, we were forced to pay \$200 more freight charges than we could have secured over other routes. Had it been mandatory for the agent to insert the rate, we never would have purchased the bills of lading, but would have rejected them.

We believe the above suggestions are so simple and effective that they would amply safeguard bills of lading, and it would not be necessary to enact a law compelling banks, etc., to secure a written statement from the issuing agent as to the validity and

truthfulness of bills of lading before making advances on said documents—this would be a needless and cumbersome method that would stop the wheels of commerce. An order from the commission would be sufficient and a law be unnecessary.

Yours, very truly,

CHAPIN & Co.,
Per ROBERT W. CHAPIN, *President*.

THE AMERICAN BANKERS' ASSOCIATION,
New York, March 20, 1912.

HON. MOSES E. CLAPP,
Chairman Senate Committee on Interstate Commerce,
Washington, D. C.

MY DEAR SIR: Bearing in mind your suggestion that the Clapp bill (S. 957) ought to be shortened and that the main thing which would seem to be necessary is simply a law that would overturn the rule of the Friedlander case, Prof. Williston and myself, acting on behalf of the American Bankers' Association, have prepared a final modified draft of S. 957, copies of which I inclose, asking that same be considered as a suggested form of law that would meet the requirements of the interests we represent as well as remedy the many evils necessary to be corrected by Federal legislation.

To briefly describe this modified draft and how it differs from S. 957, would say that, taking the latter as a basis, the following are the material differences:

1. Sections 1, 2, and 3 of S. 957 have been eliminated. These define order and straight bills of lading and provide certain things they must and must not contain. When these provisions were originally drafted, the Interstate Commerce Commission only had power to make recommendations concerning the form of bill, but since the powers of the commission have been increased the matters covered by sections 1, 2, and 3 may properly come within the scope of regulation of the commission and are not really necessary in the proposed law.

2. Section 4 of S. 957 is made section 1 of the modified draft. This has been shortened by taking out the provisions as to estoppel and simply retaining those as to liability of the carrier, which are sufficient. The proviso limiting liability is the same as that in the State uniform bill of lading act and the Pomerene bill, and is satisfactory to the carriers, with the exception that we have redrafted the "shipper's load and count" provision, concerning which there was so much discussion. We provide, in effect, that where such words are on the bill the carrier shall not be liable, but we prohibit the carrier from putting such words on the bill without the consent of the shipper in all cases where he has been requested by the shipper and given reasonable opportunity to verify the description of the property. This section 1 of the suggested modified draft therefore overturns the rule of the Friedlander case and provides a general liability of carriers where their agents have issued bills without goods, or have issued unmarked duplicates which are in effect the same, and it couples an exemption of the carrier from liability in those cases where it is just that he should be exempted.

3. Section 2 of the modified draft is the same as section 5 of S. 957, except that we shortened same by taking out estoppel, leaving in liability. This relates solely to order bills and makes the carrier liable where he leaves the bill outstanding. This, of course, is a matter not covered by the Friedlander case, but, as explained by Prof. Williston at the last hearing, in view of certain decisions relieving carriers from liability where the goods had been delivered to the holder of the bill without taking it up and the holder afterwards negotiated the bill, this is a danger to those who advance value on bills of lading which requires legislation making the carrier liable equally as in case of false bills. In other words, the holder for value of a bill of lading ought to be protected where there are no goods behind it, not only where the carrier never received the goods originally, but also where he has parted with the goods and left the bill outstanding.

4. Section 6 of S. 957 is made section 3 of the modified draft. Having by the preceding section made the carrier liable for delivering goods without taking up the bill, this section naturally follows to exempt him from such liability in proper cases as where the goods are taken from him by legal process, or are sold to satisfy his lien and the like. In order, however, to protect the holder of the bill in such cases, as far as possible, there has been added a provision requiring the carrier to notify the consignee or party according to the terms of the bill to be notified of arrival that they may protect themselves as far as possible.

5. Section 7 of S. 957 is made section 4 of the modified draft. It provides in effect that a bill altered without authority should be good for its original tenor. This is to prevent the bona fide holder being injured from the application of the rule of the common law that the alteration of a bill makes it void and of no effect. Decisions exist which make this section important in the interest of the bona fide holder.

6. A new section has been added to the modified draft, section 5 relating to bills in sets issued by ocean carriers. It is desirable that this legislation cover not only interstate but foreign bills of lading and it is made to cover foreign bills by section 1 of the modified draft and would apply to through bills, issued by the railroads of the country for goods shipped to foreign countries. Such railroads do not issue these in sets. But the custom is still in vogue for ocean carriers to issue bills in sets and in view of the criticism and the fear of such ocean carriers that the proposed law prohibiting unmarked duplicates would apply to sets of a bill and make them liable on each one of a set, it has been thought wise to add this section.

I trust you will pardon the length of this explanation of the modified draft which I have endeavored to make as brief as possible and accept it as a suggestion from the interests represented by us of the kind of law which is deemed necessary for the protection of all those who advance value on the faith of bills of lading. Copies of this suggested modified draft have been forwarded to ex-Senator Faulkner, representing the railroads, Mr. Francis B. James who appeared in behalf of the Pomerene bill, and Mr. Lynde representing the Chicago Association of Commerce.

Very truly, yours,

THOMAS B. PATON,
General Counsel.

FINAL MODIFIED DRAFT (S. 957 AND H. R. 4726) RELATING TO BILLS OF LADING.

[Suggested on behalf of American Bankers' Association.]

That every common carrier, railroad or transportation company (hereinafter termed "carriers"), who himself or by his officer, agent, or servant, authorized to issue bills of lading, shall issue an order bill of lading or a straight bill of lading for the transportation of property from a place in one State to a place in another State (the word "State" to include any Territory or District of the United States), or from a place in the United States to any foreign country before the whole of the property as described therein shall have been actually received and is at the time under the actual control of such carrier to be transported, or who shall issue a second or duplicate order bill of lading or straight bill of lading for the same property, in whole or in part, for which a former bill of lading has been issued and remains outstanding and uncanceled, without prominently marking across the face of the same the word "Duplicate," or some other word or words indicating that the document is not an original bill of lading, shall be liable to the consignee named in a straight bill of lading or to the holder of an order bill of lading who has given value in good faith, relying on the description therein of the property for damages caused by the nonreceipt by the carrier of all or part of the property, or its failure to correspond with the description thereof in the bill of lading at the time of its issue, or for the failure to mark the word "Duplicate" or other word or words as hereinbefore provided upon a second or duplicate bill of lading:

Provided, That if the property is described in an order or a straight bill of lading merely by a statement of marks or labels upon the property or upon packages containing it, or by a statement that the property is said to be of a certain kind or quantity, or in a certain condition, or it is stated in any such bill of lading that packages are said to contain property of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in any such bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading although the property is not of the kind or quantity or in the condition which the marks or labels indicate, or of the kind or quantity or in the condition it was said to be by the consignor. Also, if a bill of lading contains the words, "shipper's load and count" or other words indicating that the property was loaded by the consignor and the description made by him, the carrier shall not be liable for damages caused by the improper loading, nonreceipt by the carrier, or misdescription of the property. But without the consent of the consignor a carrier shall not insert in a bill of lading the words "shipper's load and count" or other words of like purport, if requested by the consignor and given reasonable opportunity to verify the description of the property.

SEC. 2. That every carrier who himself or by his officer, agent, or servant, shall deliver the property described in an order bill of lading without requiring surrender and

making cancellation of such bill, or, in case of partial delivery, indorsing thereon a statement of the property delivered, shall be liable to every person who has acquired, or who thereafter shall acquire, in good faith and for value, any such order bill of lading for the damages which he may have sustained because of reliance upon such bill according to its original tenor and effect.

SEC. 3. That no carrier shall be liable under the provisions of this act where the property is replevied or removed from the possession of the carrier by other legal or governmental process or authority, or has been lawfully sold to satisfy the carrier's lien, or in case of sale or disposition of perishable, hazardous, or unclaimed goods, in accordance with law or the terms of the bill of lading, or in case of other lawful excuse for refusal to deliver: *Provided*, That in every such case due notice to be given by the carrier to the consignee or to any party who, according to the terms of the bill of lading, is to be notified of the arrival of the goods at their destination.

SEC. 4. That any alteration, addition, or erasure in a bill of lading after its issue without authority from the carrier issuing the same, either in writing or noted on the bill of lading, shall be void, but such bill of lading shall be enforceable according to its original tenor.

SEC. 5. Nothing herein contained shall be construed as prohibiting the issue of bills of lading in sets by ocean carriers, or as rendering such carriers liable for delivering the property without requiring the surrender of all parts of a set of bills of lading issued for such property.

BOSTON FRUIT AND PRODUCE EXCHANGE,
Boston, April 15, 1911.

MR. MOSES E. CLAPP,
Chairman Committee on Interstate Commerce,
Washington, D. C.

DEAR SIR: At a meeting of the transportation committee of the Boston Fruit and Produce Exchange, held on April 12, it was unanimously voted to indorse the final modified draft (S. 957 and H. R. 4726) relating to bills of lading.

Respectfully, yours,

ALTON E. BRIGGS,
Executive Secretary.

THE TRANSPORTATION CLUB OF LIMA,
Lima, Ohio, April 12, 1912.

MOSES E. CLAPP,
Chairman Committee on Interstate Commerce,
Washington, D. C.

DEAR SIR: At regular monthly meeting of the Transportation Club of Lima, April 3, 1912, it was the consensus of opinion of this club that the Pomerene bill, S. 4713, be adopted, with the elimination of section 3.

Yours, truly,

D. L. RUPERT, *Secretary.*

FRIDAY, APRIL 26, 1912.

UNITED STATES SENATE,
COMMITTEE ON INTERSTATE COMMERCE,
Washington, D. C.

The committee met at 10.30 o'clock a. m.

Present: Senators Clapp (chairman), Nixon, Cummins, Brandegee, Townsend, Foster, Clarke, Gore, Watson, and Pomerene.

STATEMENT OF HORACE TURNER, MOBILE, ALA., REPRESENTING HORACE TURNER & CO., EXPORT LUMBER, PRESIDENT TURNER-HARTWELL DOCKS CO.

Senator BRANDEGEE. Mr. Chairman, Mr. Turner testified before the Committee on Interoceanic Canals a few days ago and spoke of bills of lading, and Senator Townsend and I both thought it was

important, and I asked him to appear before this committee this morning.

Senator TOWNSEND. I thought it would be possible for us to have a meeting here this afternoon and take Mr. Turner's testimony before this committee, when such questions could be asked him as might be desired.

Mr. WHEELER. Mr. Chairman, I think a word of explanation is perhaps in order. As Senators Brandegee and Townsend both know, Mr. Turner was very urgently requested to remain over, both by themselves and Senator Johnston and others of the committee who heard his testimony, and owing to Mr. Turner's engagements it was a very great personal sacrifice if he did remain over, and he hesitated to say so at the time, that is, to accede to the request, but before we left the committee room that day he determined to remain over and at once advised the clerk of your committee to that effect.

In view of this fact, I would like very much if, under these circumstances, and inasmuch as he has been very good to remain over, the committee would see its way to giving him a hearing this morning.

Senator CUMMINS. I move that Mr. Turner be immediately heard. The motion was agreed to.

The CHAIRMAN. State your name, residence, and occupation.

Mr. TURNER. My name is Horace Turner; residence, Mobile, Ala.; occupation, member of Horace Turner & Co., exporters of lumber, and president of the Turner-Hartwell Docks Co., Mobile, Ala.

I wish to speak on the subject of through bills of lading. The cotton crop of the South is absolutely, as far as competitive cotton is concerned, dependent upon and moves on through bills of lading, which bills of lading practically control the cotton crop and movement by the different ports in the South. Unless you can get a through bill of lading it is impossible to ship and you can not obtain this through bill of lading except by such routes as the railroads select.

Now, at Galveston and New Orleans every steamship line running there gets through bills of lading. The railroads issue those through bills of lading to all of them alike. At Mobile they are taking a different tack. They have made an exclusive contract with only one line to Europe, and they will not let anyone else land a steamer at their wharf; and will not issue such competing lines a through bill of lading. The shipper is, therefore, in this position: He can make a contract to move all the cotton he will generate for three months, say 5,000 bales, and he can contract at a certain rate with some one steamship line of his selection at the port of Mobile. He is unable to ship by this particular steamship line simply because he can not get a through bill of lading to send his cotton via Mobile. The railroads absolutely refuse to let him utilize the competition. They say to him, "You can get a through bill of lading, or you ship by that particular line"—which, for example, I will call the Elder-Dempster line—through the port of New Orleans, "but we will not give you a through bill of lading by the Elder-Dempster line if cotton move via Mobile." "We will give you a through bill of lading by this particular line if their steamer comes to Gulfport," but they absolutely refused to do it through Mobile.

In other words, they use this bill of lading as a club to compel the routing of this cotton, and this routing, I think, should be left absolutely to the discretion and the selection of the shipper. He is the

one man vitally interested in it. The shipper at the interior points is absolutely allowed to route his own domestic shipment by whatever lines of railroad he pleases, and we think the shipper of cotton exporting goods of that character should be allowed the same privilege—that is, of selecting his own steamers, and those from which he can get the most favorable freight rates and accommodations. The through bill of lading in this cotton movement limits the liability of the carrier to the delivery of the goods to the steamship or the agent of the steamship company at the port, and we can not see wherein the railroad is in any wise affected by giving it to everybody. We feel that the minute any man can select the routing of his export goods he will not be put in the position where he will have to permit the railroads to say that he must route the cotton by their particular steamship line and at the rates charged by that particular steamship line, but instead that he can route goods by the same railroad and by some other ocean carrier which might give a more favorable contract, and thus enjoy the competition that results from different ocean lines in a port.

We have different lines at Mobile. They are struggling there in competition with the one line that has through bills of lading, and they are compelled, you might say, to restrict their operations to local cotton; that is, cotton that is concentrated at the port, and the lumber and logs and naval stores that are picked up at that port, and go together with the cotton to make a load for a steamer. We think these independent steamship lines should have the same privilege of competing as the railroads' specially favored ocean carrier for this interior cotton. It would help the shipper and it would help the steamship lines to exist and would give us all competition.

I also want to say that the port of Mobile generates as many tons of freight as does the port of Galveston, where they have this through bill of lading, and I think it is as essential that we have the through bill of lading as that every line at other ports should have same.

The control of the terminals in our port has been used also absolutely to run out competition. We have a steamboat line that was operated by the merchants of Montgomery, between Mobile and Montgomery on the Alabama River, upon which river the Government had spent quite a lot of money. That line began to bring shipments from New York by the Mallory Steamship Line to Mobile. This Mallory Steamship Line landed at the docks of the Southern Railway under an exclusive contract. The railroad company, as soon as it found that this barge line was getting this freight from New York by steamer, immediately notified the Mallory Line that they must not let this barge line land—not only not alongside of the steamer, but denied barge line a berth at the wharf, after the steamer had gone, to take this freight. So the barge line was put in the position that it had to pay wharfage on the goods, and had to dray the goods across town to another wharf, and had to pay still another wharfage in order to take them up the river. On goods that come from the West that were absolutely controlled by the merchants themselves, the railroads permitted the merchants to load those goods over the railroad wharf on to the barge. That was simply because the merchants controlled the routing. Had railroads controlled routing on through bills of lading, they would have had the merchants of Montgomery at their mercy exactly the same way as

in the case of the goods on the Mallory Line, where they controlled the wharf at which the Mallory Line landed.

The sum and substance of it is that some months ago this barge line went out of business. We have still another example of how we have suffered from control of the terminals. The United States Shipping Co. of New York put on a service from Mobile to Colon some years ago to carry such goods as pipe and machinery, which passed through southern ports to the canal commission. They made a contract, or an arrangement with the railroad under which they landed at the railroad wharf for a short time. For one or two steamers they received through bills of lading from the railroads, and received every consideration, but all of a sudden the railroads notified steamship people that they would not work with them any longer.

Senator POMERENE. What railroad was that?

Mr. TURNER. The Mobile & Ohio Railroad. They canceled their agreement permitting steamers to land at the railroad wharf and this line struggled along and finally had to go to Gulfport, where they could get some cargo, in the shape of lumber for the commission, and work out a bare existence between these two ports, Mobile and Gulfport. In fact they have now practically abandoned the service.

They came back to Mobile in June, 1910, and they attempted to revive this agreement. They asked the railroad if they would permit them to land at their wharf and take cargo, and offered this service to Colon. The railroad told them no, that they did not have any facilities that they could let them have, and they did not want to do business with them unless they worked over their railroad terminals, and until they built more wharves they could not give dockage to their steamers. The steamship line said that as other facilities had been built (those that I am interested in) "Could they land down at the new wharves and would railroads deliver their goods alongside their ships at the shipside rates in effect," which shipside rates provided for the payment of terminal charges, at the different ports, on goods that go over both railroad and competing docks alike. The railroad said, "No; we are going to limit our tariffs to restrict shipside delivery to only wharves reached by our own roads;" in other words, "their own wharves," now that new terminals had been constructed.

So the steamship line was again in a very embarrassing position. They had a shipment of pipe that was coming from Chattanooga and they tried to get it to Mobile. The Mobile & Ohio notified their connecting railroad line that they could not reach the boats of the United States Shipping Co., the reason being, of course, that they would not let them land at their wharf, and therefore they could not reach them. So the Mobile & Ohio had those goods routed in the face of the earnest request and insistence of the shipper, who begged for the Mobile route, and sent via New Orleans to Colon. These continual tactics of course forced out the steamship line so that stopped the business, and now we have no line to Colon from Mobile.

We had exactly the same experience as to business to Cuba, this same company losing quite a lot of money operating a service to Cuba, being fought in the same way by refusal of through bills of lading and shipside deliveries. This case of the United States Shipping Co. was appealed to the Mobile Chamber of Commerce, who appointed a committee and heard both the railroad and steamship

sides of the issue. The chamber of commerce decided there was a most unjust discrimination and the Mobile & Ohio Railroad and Southern Railway were asked to cease discriminating. The railroads, who had first gone before the chamber of commerce to have the case tried, then notified the chamber of commerce that they would fight the case to the Supreme Court, and they are seemingly going that way. It has gotten as far as the Interstate Commerce Commission and briefs in the case have already been filed.

Now, there is a remedy, and that is what we want to ask, that we be given the right to demand through bills of lading via any port and with any steamship line of our selection. We also ask that any wharf company, whether it be municipal, private, or public, or railroad owned, be placed absolutely under the control of the Interstate Commerce Commission; that immediately a wharf is built and used in interstate commerce, that it be absolutely declared a public utility and be opened to all alike. If you do not do this, you have then permitted a barrier or gateway to be erected between the channels built by the Federal Government, or the waterways improved by the Federal Government, and the railroads on land, for by simply buying a strip of land across the city, and by utilizing a small part for their own purpose and by refusing to let others build or improve the balance of it, the railroads can absolutely control the destiny of that port. The railroads can control the steamers that land at wharves and the route by which the shipper must ship, and there is absolutely no chance for independence or freedom of competition on the ocean.

The matter of terminals has been ably treated, I find, by the Commissioner of Corporations, Mr. Herbert Knox Smith, in volume 3, and I brought with me the briefs that we have just filed before the Interstate Commerce Commission and will read a few paragraphs which bear along the line upon which I have spoken, that is, the absolute control of terminals by some Federal provision, so that they will not be used as a barrier to commerce. There is, perhaps, in the United States not over 100 miles of water front at the ports that absolutely controls the commerce of this country.

Senator TOWNSEND. I did not catch that.

Mr. TURNER. I say there is possibly 100 miles of length of water front at the ports in the United States that absolutely controls the destiny of the commerce of America. This frontage is largely to-day owned and controlled by railroads and is used absolutely to impede commerce, as will be shown by the report to which I have referred. Some of the pithy remarks in this report might well be read for your information. I read as follows:

That the terminal is weakest link in water system, widely nullifying advantages of cheap transportation.

That the greatest obstacle to water terminal advance is the present adverse attitude of rail lines toward independent water traffic and in exclusive control of frontage.

That channels dug by Federal Government absolutely dependent upon terminals—many criticisms aimed at channels when real trouble is in terminals.

That private control of terminals may destroy public nature of channels.

That in case Erie Canal the indications are that railroads' policy has been to suppress traffic by their control of terminals and influence upon floating equipment.

That railroads refuse use their piers for freight not passing over their lines and refuse use piers to independent vessels—Philadelphia for example.

That at Atlantic ports and Pensacola the terminals controlled by railroads used to hinder development of rival water systems.

That New Orleans, of all the Gulf ports, by ownership of river front and belt railroad, stands out prominently as a port properly developed and capable of the highest development.

That control of water front and terminals on the Lakes destroys possibility of development.

That at Buffalo, for example, railroads largely control terminals and water front, and refuse use to lines competing with railroad-controlled water lines.

That large control by railroads and their subsidiary concerns of terminals at nearly all ports and that railroad control works to disadvantage of water traffic.

That traffic is attracted by ample facilities for storing and for quick handling of freight.

That the ownership of terminals should not be adverse to water traffic. Water terminals so affect the public that some degree public control necessary

Here are the general conclusions:

General conclusions:

Terminals are as important as channels.

Harbors have not developed frontage to full capacity.

Great influence exercised over water terminals by railroads.

Adverse action of rail to water transportation is detrimental to public.

That extensive ownership and control of terminals by railroads a serious factor.

That there is urgent necessity for action which shall prevent railroads or other private ownership of terminals from resulting in unjust discriminations and unnecessary burdens upon commerce.

That the right to build wharves is subject to public right of navigation.

That anyone maintaining a dock or wharf is entitled to compensation called dockage or wharfage.

Senator CLARKE. From what are you reading?

Mr. TURNER. That is taken from the report of Herbert Knox Smith, but it was in a brief filed by us before the Interstate Commerce Commission.

Senator BRANDEGEE. When was that report made by Mr. Herbert Knox Smith?

Mr. TURNER. It came out, I think, in the fall of 1910.

Senator BRANDEGEE. It is in three volumes, you say?

Mr. TURNER. There are three volumes, but it is volume 3 on Water Terminals that controls that very situation.

Senator BRANDEGEE. I simply wanted to identify it in the record so that we could get it in case we desired to read the whole report.

Mr. TURNER. I want to make one statement, which is along the line of some of your inquiries of Wednesday, namely, that this water front had a public nature. The State of Alabama absolutely provides in its constitution that you can not erect any wharf or impediment to the channel except expressly authorized by the law of the State, and the law of the State further provides that you can only erect a public wharf for public convenience. The law is quoted in this brief where I have turned down the page, and I will leave it with the committee.

Senator POMERENE. Suppose you refer to the pages, so that it can be placed in the record.

Mr. TURNER. It is page 27 of the reply brief.

Senator POMERENE. I suggest, Mr. Chairman, that it be put into the record.

The CHAIRMAN. Very well.

Mr. TURNER. I will read it instead of referring to the page:

Section 24 of the constitution of the State of Alabama provides: "That all navigable waters shall remain forever public highways, free to the citizens of the State and the United States, without tax, impost, or toll, and that no tax, impost, toll, or wharfage shall be demanded or received from the owner of any merchandise or commodity for the use of the shores or any wharf erected on the shore, or in or over the waters of any navigable stream, unless the same be expressly authorized by law."

The law then goes on to say, under section 3040 of the Code of Alabama:

"Riparian owners upon the navigable and other waters of this State, who maintain in good order, for public convenience, erections and ferries upon the banks or shores of such waters, shall be entitled to charge usual and reasonable rates for the use thereof, or such rates as are prescribed in the several acts heretofore passed authorizing such erections or ferries, or agreed on by such owners with the corporate authorities of any city, or town, or county in which they are situated; but no erection or structure, or ferry of any kind shall be permitted injuriously to affect the rights of navigation in such waters."

Now, I contend that unless these wharfage facilities used in the movement of interstate commerce are absolutely public in their nature, no matter to whom they belong, they are absolutely a barrier and impediment to commerce. They should not be allowed to be called private terminals and be used absolutely to bar out this steamship line or that steamship line as the railroads see fit. The shipper should be allowed to select his own steamship line, and then should be allowed to go to any wharf or terminal he pleases. To accomplish this free movement of export goods one other thing is necessary and that is an absolute separation of the road from the terminal charge. This has been done as far as cotton in the South is concerned, but as to no other commodity.

As to the matter of rates to ship side on other goods moving, we will say, to Colon or to the West Indies, generally the rates read "to ship side," and in the rate is an amount for the terminal charge. This terminal charge, as well as the road charge, is of course retained by the railroads when the goods pass over the railroad-owned wharves, and it makes no difference to them simply because entire revenue remains in one common treasury. When the goods do not go over the railroad wharves, and where they do not supply adequate facilities for all the vessels coming to a port, or they refuse absolutely to let vessels come there and load their cargo, these vessels have got to land at other wharves, in which event these other wharves have got to be paid out of that ship-side rate the amount of terminal charges necessary for their upkeep and interest on the investment. At Galveston and New Orleans there is no question so far as to this allowance. The wharves have been fairly treated so far; I do not think liberally treated, for there is a case now before the Interstate Commerce Commission from Galveston in which that company is seeking to raise its wharfage charges to an amount sufficient to pay them 6 per cent on their investments. This is combated—that is, this increased schedule of wharfage rates—by the railroads, and practically every railroad into Galveston uses the terminals of the wharf company there, which are very excellent in their construction.

Now, at Mobile the Mobile & Ohio and Southern Roads contend that (although terminal charges are included in the rates)——

Senator POMERENE. Is what?

Mr. TURNER. Included in the rates, two of the railroads contend that they absolutely will not allow any of those terminal charges to any competing wharf company, and a man shipping over a wharf and via rival steamship lines is put in the position where he must pay the rates to ship side, which, for example, we will say amount to \$60 per car, and in addition the terminal charges that are necessary to get goods over any other dock not touched by the rails of these railroad companies. Here is the situation: If a shipper will let the railroad route his goods via the ocean line they select and at the rates charged

by the steamship line with which they are operating, he can get his goods to Mobile on board the ship on the basis of \$60 a car. If he goes a mile south to the wharves built by any of the other railroads or private concerns, he has got to pay the ship side freight rate or \$60 plus, we will say, \$5 additional for the terminal charges, or a total of \$65. If he goes down to Gulfport, possibly 60 miles farther, he can get his goods on board vessel and shipped from there for \$60. If he goes to New Orleans, he can get his goods on board a steamer for \$60. If he goes to Galveston, he can get his goods on board for \$60, and we are, by the very manipulation of these terminal charges, put at a disadvantage, and this principle established at Mobile can be put into effect at any other port just as fast as it suits the railroads to do so.

Now, we contend and ask of your committee that the rates be built up by making the road charge one rate and the terminal charge another rate, both adequate and ample to take care of not only the road but the terminal as well. The terminal is just as essential as the railroad, and if when built you do not protect them and you do not throw proper restrictions around them, there will be no freedom on the sea, because they are needed absolutely for the ship and the shipper.

I could talk to you at greater length, but my time is up and I will stop.

Senator TOWNSEND. I want to ask you one question that has occurred to me. In this bill of lading, did I understand you to say that it provides that the railroad company is responsible only for the goods to ship side, even though there is a through bill of lading?

Mr. TURNER. Absolutely.

Senator TOWNSEND. So whatever happens to the goods on the boat the railroad company is not held responsible to the person to whom the railroad issues the bill of lading?

Mr. TURNER. I have never known a case where there was any question about the goods after they got on board vessels. They are shipped by every steamer—tramp or liner—through all the other ports just on request of the shipper who is using these other ports. The goods go through absolutely all right and they all limit their liability to the delivery to the ocean carrier or the ocean carrier's agent at the port. The goods on board ship are always insured under a marine policy. I contend that the railroad responsibility ceases, as it is so stated in their bill of lading, a copy of which I will be glad to send to the committee immediately upon my return to Mobile.

I wish to say that we asked the Interstate Commerce Commission in this very case to permit us, in the event they thought the through bill of lading with this restriction in it, relieving the railroad from responsibility after delivery was made to the ocean carrier, did not absolutely relieve the railroad from all responsibility, to allow shipper to give some form of receipt to the railroad company in lieu of which shipper would get a through bill of lading; in other words, obtain a piece of paper that would show that shipper was sending some goods from some point in the interior via a steamship line of his selection to a port of Europe.

There can be no logical reason for criticizing the financial responsibility of the steamship line, in my opinion. At Mobile, up to September, 1910, the Elder-Dempster Line operated under an exclusive

contract with the railroads, two of them there, the Mobile & Ohio and Southern. They obtained through bills of lading, dock facilities, and every consideration, and the manager of that line in this very hearing testified that while he personally enjoyed and liked this monopoly very much he was forced to admit that it was not for the good of the public.

Now, that steamship line, after September, 1910, was forced away and a contract was made with a new line—the Leyland-Harrison Line—of steamers. They enjoy the through bills of lading, the exclusive use of the wharves, and the railroads use every means they can to keep anyone else from shipping this cotton by any rival steamship line. The Elder-Dempster Line is operating principally at the Gulf ports of Mobile, Galveston, and New Orleans. A shipper, we will say, at a point like Selma, Ala., which is a concentration point for cotton, is in this position: He is told, if he wants to ship by the Elder-Dempster Line via a steamship for Liverpool, "We won't give you a through bill of lading from Mobile, because we are only writing for one line (Leyland-Harrison Line), but we will give you a through bill of lading by the Elder-Dempster Line if you will ship via Gulfport, Miss., or New Orleans." Now, again, we find a shipper who has contracted with the Elder-Dempster Line to move 5,000 bales of cotton within a period of three months. At the time he engages this freight room he does not know where he is going to buy his cotton. If he should happen to buy it in a territory where he could ship through New Orleans, well and good. If he has to buy cotton at another point, near Mobile, and wants to ship via Mobile, why, he is absolutely barred out. The Elder-Dempster Line can only take from Mobile such cotton, lumber, and naval stores as are what we would call local goods—that is, those which come to Mobile on local loadings from near-by points or by the river steamboats. Goods accumulate at Mobile, as, in case of lumber, logs, and material of that kind, which is always accumulated at the port. When it comes to competitive cotton from a point one night's run away, the bill of lading does not affect the situation so much. That is, cotton might move on a local bill of lading in one night and next day cotton is delivered and local bill of lading exchanged for an ocean bill of lading and the shipper not be out his money on this cotton very long. I should say that the interest on this cotton is about a cent a bale a day; say 50 cents per carload of 50 bales per day. If you take that on a shipment of a thousand or a few thousand bales of cotton and delay it over periods of 10 days or 15 days where the railroads are slow in handling the cotton to the ports, it is such an item that the shipper can not afford to go to that expense. Furthermore, a shipper can not finance himself, because cotton represents such a large amount of money—something like \$50 to \$75 a bale, according to the market—and the banks can not finance a man shipping that cotton. He has got to have his through bill of lading, and that is marketable and is turned immediately into cash. So a shipper is put in the position where, even though it costs a little more, he has got to ship into Mobile and use the steamship line selected by the railroads so long as he must use these railroads, and a slightly higher rate paid, in order to get a through bill of lading and finance himself and do business.

Senator BRANDEGEE. You do not mean that where the railroad owns the steamer and issues a through bill of lading that they attempt to limit their liability to what happens on the railroad, do you?

Mr. TURNER. I do not quite understand that question.

Senator BRANDEGEE. I say, if the railroad owns the steamship line over which it issues the through bill of lading, you do not mean that the railroad limits its liability to only the railroad and disclaims liability for what happens on the steamship, do you?

Mr. TURNER. None of the European traffic is handled by steamers owned by the railroads at all, and I do not know, in case of a bill of lading that they might issue on certain business handled by some of their own steamers, what they would do, but I know the entire cotton crop throughout the South—and a steamer load of cotton will often represent a million dollars—is all handled by these different competing steamship lines and there is the utmost freedom at other ports, with greater competition which results to the benefit of the shipper and commerce. At our port we are restricted by this through bill of lading only to the one route the railroads select, despite the fact that there might be other steamers in that port seeking cargo and at lower rates than other lines and ports offer.

Senator BRANDEGEE. What I want to understand is this: Do you know of any particular instance where the railroad, owning its own connecting steamship line, and issuing a through bill of lading, attempts to limit itself to liability for damage for loss to what happens on the railroad, and to disclaim liability for what happens on the water?

Mr. TURNER. I am not personally familiar with any case where a railroad owns its own steamers.

Senator BRANDEGEE. Now let me ask you this: Will you define, please, what this proceeding was that you intimated was brought by the Mobile Chamber of Commerce against some railroad before the Interstate Commerce Commission—was it?

Mr. TURNER. Yes.

Senator BRANDEGEE. What was the name of that suit?

Mr. TURNER. The suit was the Mobile Chamber of Commerce and Horace Turner & Co., complainants, *v.* The Mobile & Ohio Railroad Co. and Southern Railroad Co.

Senator BRANDEGEE. You or your firm were parties to that suit?

Mr. TURNER. Yes, sir.

Senator BRANDEGEE. How was it decided?

Mr. TURNER. It is still pending. I will also state, as I did the other day, that after this investigation that we had before the Mobile Chamber of Commerce we were up before the governor of the State of Alabama, Gov. Comer, and he heard both sides of the controversy himself, and then as he was leaving office in the early part of 1911 he sent this recommendation in his message—his farewell message to the legislature:

The Merchants' Exchange at Mobile has taken up the question of the right of the State to control and regulate the docks. Complaint was made that the Mobile & Ohio and Southern Railroads did not extend to the independent shippers the same rights that they extended to certain connections shipping into and out of their docks, making it practically impossible for the independent docks, business men, or shippers to compete in the trade going out of the port of Mobile. The State was requested to maintain its riparian rights and to regulate the charges, conduct, and terms of the owners of the docks doing business there. In opposition, the Mobile & Ohio and Southern Railroads plead that the docks were theirs; that they built up the export and import business, and that they had the right to make their own rules and regulations, citing what the Louisville & Nashville had done along the same line in Pensacola.

This is, in my opinion, a most serious question. The harbor at Mobile, or any part of it, should not belong uncontrolled and unregulated to any railroad or individual what ever. The harbor at Mobile does not belong to the city of Mobile; it does not belong to Alabama; it does not even belong to the United States. There should be maintained there a right for every shipper, for every commerce, and this should be to the best interest of every shipper or corporation that constructs a dock, because any different course would bottle up or throttle the catholic use of the great port of entry. The value of Mobile Harbor to the commerce of Alabama to the United States, to the world, can not be calculated. The Lord has laid from the mouth of the harbor connections to the farthest commerce of the world. The government of Alabama should demand from the Federal Government that the channels into this great port of entry be deepened to the depth of any shipping vessel.

I will call your attention to the fact that President Taft, in his message to Congress, recommended the passage of a law prohibiting interstate-commerce railroads from owning or controlling ships that carry commerce through the Panama Canal, giving as a reason that such a policy would create a monopoly and destroy competition. If this is a danger, and it is, in the Panama Canal, for the world-wide intercarriage of freight, how much more is it a danger and how much more to be avoided by every legal means is the control of the Mobile Harbor by the railroads? I can not too strongly recommend to the incoming legislature and administration the importance of this proposition and the danger involved. It may look small to-day, but the time will speedily come when it will be one of the most important questions before the State; one which the railroads should not be allowed to smother, conceal, or control.

Senator BRANDEGEE. That is in your brief, is it?

Mr. TURNER. Yes, sir.

Senator BRANDEGEE. You have already referred to your brief.

Senator TOWNSEND. Do you propose to put in the brief?

Senator BRANDEGEE. No; I do not want to incorporate all the proceedings in this suit in the record.

I will ask you this: Do you claim that a private wharf of riparian proprietors in Alabama on a navigable stream ought to be compelled to allow everybody to land upon that wharf front?

Mr. TURNER. I think if that wharf is a public necessity, or is being used in interstate commerce, and it is wanted to be used by anyone else for interstate commerce, it should be permitted.

Senator BRANDEGEE. Do you think under the Constitution of the United States you could accomplish that without compensating the owner?

Mr. TURNER. Our State provides, as I read to you, that he is compensated by an adequate wharfage charge. If he is dealing in the wharfage business, and is permitting one steamer to land there and pay wharfage on the goods passed over it to that steamer, he should be compelled to let any other steamer, up to the limit of the capacity of that wharf, use that same wharf.

Senator BRANDEGEE. I admit that he should be permitted, but do you claim that he should be compelled?

Mr. TURNER. He should be compelled to.

Senator BRANDEGEE. Do you think he can be legally compelled to?

Mr. TURNER. I do.

Senator BRANDEGEE. I do not.

Senator CUMMINS. I do.

Mr. TURNER. It seems to me that this possibly 100 miles of shore line in the different ports of this country can either make or break commerce, and can either be made a barrier or a channel for commerce, as you might put it, so should be controlled.

Senator BRANDEGEE. That is a legal question, and you have answered it. That is all I care to ask.

Senator GORE. What was your reference just now to 100 miles of wharves, or water front at wharves?

Mr. TURNER. It was an estimate merely; of course it is a guess as to just about what all the combined water frontage used for terminals at all the ports in the United States would amount to, and I should say 100 miles would cover the entire terminal water front improved at the different ports.

Senator GORE. Have you any data as to how that is owned, how much belongs to the public and how much to private individuals or private corporations?

Mr. TURNER. I have not any exact data, but will refer you to volume 3 of Mr. Herbert Knox Smith on Water Terminals. It is a study of the condition at the different ports. It would require quite an effort for anyone to carry those figures in his head.

Senator GORE. How much front is there at Mobile?

Mr. TURNER. The city owns 1,500 feet of wharf front. It is used mainly for up-the-river traffic, and is so congested now that there is only a possibility from time to time of an ocean steamer getting to it and taking some cargo. The city is not in a position financially to get any more river front or to make any more improvements.

Senator GORE. What is the total frontage there?

Mr. TURNER. I should say, roughly, 15,000 feet of improved wharves.

Senator GORE. And the city owns 1,500 feet?

Mr. TURNER. Yes, sir.

Senator GORE. How is the rest owned?

Mr. TURNER. Well, I should say the railroads own 60 per cent of it, roughly speaking.

Senator GORE. What railroads?

Mr. TURNER. The Mobile & Ohio, the Southern Railroad, the L. & N., and the New Orleans, Mobile & Chicago Railroad.

Senator GORE. Could you file with your statement the exact amounts owned by each?

Mr. TURNER. I could.

Water frontage owned by the Mobile & Ohio and the Southern Railroads at Mobile, as testified to by them, amounted to 3,384 feet. It is improved by slips dug into the shore and gives about the following results:

Approximate linear feet improved wharves owned by railroads at Mobile:

Mobile & Ohio R. R. and Southern R. R., combined.....	6,200
Louisville & Nashville R. R.....	1,500
New Orleans, Mobile & Chicago R. R.....	1,500

Senator GORE. And the other 40 per cent, who owns that?

Mr. TURNER. The company represented by myself owns the largest independent public terminal there.

Senator GORE. How much is that?

Mr. TURNER. We have about 4,000 feet.

Senator GORE. Between 20 and 30 per cent of the whole. Do you think private companies and private corporations ought to be allowed to own any of it?

Mr. TURNER. No; emphatically not. It ought to be owned by the municipality, as is the case in Europe. In Canada, I see that the Canadian Government has taken charge of the harbors and has made improvements thereon and made regulations as to their use.

Senator GORE. The Dominion Government is doing that?

Mr. TURNER. Yes, sir.

Senator GORE. In this country, do you think the municipality should do it, or the Federal Government, or some joint arrangement between the city and State and the Federal Government?

Mr. TURNER. I fear that in this country the system we have been working under has been going on so long, and the railroads have made so much improvement; also some cities have made so much improvements and taken charge, that now we must have regulation, and if you can not regulate wharves, then the city, if it can, has got to take frontage, or the State, or lastly, the Federal Government. Otherwise you are going to throttle commerce.

Senator GORE. Do you think a system of regulation of that kind could be evolved that would bring relief?

Mr. TURNER. I hope so. I do not know that it can. For instance, you have been trying to regulate the railroads for a long time, and they have always some particular club. For example, they still have the through bill of lading that they are rapping us over the heads with, and you have not been able to regulate them as yet. Possibly you might not be able to regulate this property. For instance, a railroad can place a man in the position, when they are asked for a berth for a steamer, of waiting while the railroads make excuses, and if you consider that it costs from two hundred to five hundred dollars a day for a steamer's time, why an agent for such steamer can not remain and wait for a berth long. A municipality, for example, like New Orleans, is the ideal condition. I think the State board in that State has taken over all the river front. They condemned it all with the exception of a small part which is in the possession of the Illinois Central under lease. They have improved the frontage and made it a most up-to-date terminal. They have used a street back of it as a public belt line, and there is the greatest freedom to shipping.

Senator GORE. They made a belt line, did they?

Mr. TURNER. Yes, sir; a public belt.

Senator GORE. There is one question that I desire to ask further. Do you not think it would be better for the public—no matter whether municipal, State, or National Government—to own the water front and also to provide that any railroad, and every railroad, that wants to approach the water front can have the means of approach?

Mr. TURNER. Yes, sir; absolutely.

Senator GORE. That would prevent private monopolization.

Senator CUMMINS. I will say that Mr. Turner has already elaborated on that feature.

Mr. TURNER. Yes. A railroad can not be built, you might say, into the East or West now, as it would cost too much to get the terminals, and it seems it should be possible, and it ought to be a fact, that the municipalities should own the terminals and a belt railroad and that any railroad could come to their rear door, so to speak, and connect up by the belt line outside the city and have the joint use of their harbor facilities. In other words, terminals of this kind are a necessity to commerce, and they should be open to all alike.

Senator WATSON. I understood you to say that there were only 100 miles of water-front wharfage in this country?

Mr. TURNER. I said that was my estimate. I have never sat down and figured it up, and I do not know that I could get the exact data.

I tried to get it in my neighboring towns, and they would not answer my inquiries, so that is simply an estimate. I should say, however, that the report of Mr. Smith would cover that.

Senator WATSON. I think after you consider the matter you will want to retract that statement. Did you ever know a steamer to come to any city, New York, Baltimore, or Mobile, that did not get dockage rights?

Mr. TURNER. Yes, sir; at Mobile.

Senator WATSON. How long had the steamer to wait?

Mr. TURNER. Well, do you mean where they actually came in and anchored in the stream and waited?

Senator WATSON. Yes.

Mr. TURNER. They never get that far because no agent would dare do such an unbusinesslike thing. He first goes to the railroad and finds out if he can come there, and they tell him, "No, we won't let you land at our wharf; we have an exclusive contract with others and you can not come." So he does not land.

Senator WATSON. I will put it in another way. Did you ever know a steamer that wanted to come to Mobile and did not come there because they could not get dockage rights?

Mr. TURNER. Yes, sir.

Senator WATSON. In what instance?

Mr. TURNER. I should say the United States Shipping Co.'s steamers, for example, were absolutely stopped in their Colon service and were absolutely barred out in their service to Cuba from coming and getting wharf accommodations at the railroad wharf. It came out in the testimony in this case that I have referred to.

Senator POMERENE. Did I understand you to say that all of these roads running into Mobile would only ship by way of this one steamship line, that is, by a through bill of lading?

Mr. TURNER. No; the two principal export carrying roads in there, the Mobile & Ohio and Southern, will not give cotton through bills of lading via any except the one line, and anybody dependent on those two railroads for service at all, at the different stations, have got to do their bidding or ship by another port. The L. & N. use Pensacola as their port and of course they try to influence the cargo over there. The same system has restricted the through bill of lading, forcing cotton through Pensacola. They would not give us a through bill of lading via Mobile, and the only road there that does is the New Orleans, Mobile & Chicago, a new road, and one that does not generate much cotton.

Senator WATSON. Do you know whether there is any particular arrangement between this steamship line and these two railroads that you speak of whereby all their freight will go over that line?

Mr. TURNER. Yes, sir; the contract is published in the case we have.

Senator WATSON. Has that been called to the attention of the Department of Justice?

Mr. TURNER. I think so. Our United States district attorney at Mobile, Mr. William H. Armbrrecht volunteered his services to the chamber of commerce in this case, and I think he has discussed it with them but I do not know how far they have gone.

Mr. Turner was thereupon excused, and at 12 o'clock m. the committee adjourned.

THROUGH BILL OF LADING ISSUED UNDER AGREEMENT WITH THE LIVERPOOL BILL OF LADING CONFERENCE (1907) COMMITTEE AND THE AMERICAN BANKERS' ASSOCIATION.

Form 101 B—8-23-11.

Export bill (Series E
lading. { No. 30.

THE WESTERN RAILWAY OF ALABAMA

In connection with other carriers on the route.

Contract numbers, R. R., W. of A. 11. S. S., S, S 95. Lot No. ——. Signature certificate, series ———, No. 30.

Dated at Selma, Ala., this 4th day of December, 1911.

Received at Selma, Ala., from W. P. Welch & Co. the following property in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, numbered, consigned, and destined as indicated below.

Consignee and destination, order W. P. Welch & Co., Bremen, Ger. Party to be notified, Lentz & Hirschfeld, Bremen, Germany.

Marks and numbers.	Articles.
(Use pen and ink only in expressing marks and numbers of cotton bales.)	(Use pen and ink only in expressing the number of bales of cotton.)
Welch. Crav-100. Cilt-100.	
Car numbers.	Two hundred (200) bales cotton.
	Inland freight prepaid to ship side Mobile.
RATE.	
To Mobile..... 35	
Tfr..... 03	
Ocean..... 40	
78	* Shipper's weight, 105,574, subject to correction. (* U. S. law requires agent issuing bill of lading to write either "shipper's" or "carrier's" before "weight.")

To be carried to the port (A) of Mobile, Ala., and thence by S. S. *Aboukir* to the port (B) Bremen, Germany (or so near thereto as steamer may safely get, with liberty to call at any port or ports in or out of the customary route), and to be there delivered in like good order and condition as above consigned, or to consignee's assigns, or to another carrier on the route to destination if consigned beyond said port (B), upon payment immediately on discharge of the property, of the freight thereon, at the rate from Mobile, Ala., to Bremen, Germany, of — cents, inland; forty cents, ocean; forty cents, total, United States gold currency, per one hundred pounds gross weight, and advanced charges — (\$—), with all other charges and average, without any allowance of credit or discount; settlement to be made on the basis of 4 shillings 2 pence, 4.25 marks, 5.25 francs, 2.50 Dutch guilders, 3.80 kroner to the dollar, United States gold currency; if in other currency than herein provided for, settlement to be made at the rate of \$4.80 to the pound sterling, at the current rate of exchange officially quoted on the day the ocean steamer enters the customhouse at its port of discharge, for which banker's short-sight bills on London can be bought; when ocean freight is prepaid, \$4.86 United States gold is equivalent to 1 pound sterling.

In consideration of the rate of freight herein named it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written, herein contained, and said conditions are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

CONDITIONS.

Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading shall be void.

Attention of shippers is called to the act of Congress of 1851, which provides that any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, or

gunpowder in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise to the master, mate, or officer or person in charge of the loading of the ship or vessel, shall forfeit to the United States \$1,000.

1. With respect to the service until delivery at the port (A), it is agreed that:

1. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto, unless caused by negligence of such carrier, by reason of floods, fire, jettison, ice, collision, delay or quarantine, robbers, riots, strikes, or a stoppage of labor; leakage, breakage, chafing, loss of weight, decay, vermin, changes in weather, heat, frost, or wet; country damage on cotton, exposure while being transported upon dock or upon open cars if it be necessary, or if it is usual to carry such property; or any cause beyond the control of the carrier or party.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable dispatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any carrier between the point of shipment and the point to which the rate is given.

3. No carrier shall be liable for loss or damage not occurring on its portion of the route, nor after said property is ready for delivery to the next carrier. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent of the delivering carrier at ultimate destination promptly after arrival of the property, and if delayed for more than thirty (30) days after such delivery of the property, or after due time for such delivery thereof, no carrier hereunder shall be liable in any event.

4. All property shall be subject to necessary cooperage, baling, and repairs at owner's cost. Each carrier over whose route cotton is to be carried hereunder shall have the privilege of compressing the same, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. No carrier hereunder shall be liable for differences in weights or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by connecting carrier within twenty-four hours after its arrival at the port (A) may be kept in the vessel, car, depot, or place of delivery of the carrier, at the risk of the carrier, as warehouseman only, or may be, at the option of the carrier, removed and otherwise stored in a public warehouse at the owner's cost, and there held subject to lien for all freight and other charges. Property taken from a station or wharf at which there is no regularly appointed agent, shall be entirely at risk of owner until loaded into car or vessel, and when received from private or other sidings, or wharves, shall be at owner's risk until the cars are attached to train or loaded into vessel. In case the whole or any part of the property specified herein be prevented by any cause from going from said port (A) in the first steamer of the exporting line above stated, leaving after the arrival of such property at said port (A), the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or, if deemed necessary, by any other steamer or line.

6. Property taken from a station or wharf at which there is no regularly appointed agent, or when received from private or other sidings or wharves, shall be at owner's risk until cars are attached to train, or until unloaded into vessels. The issue of this bill of lading prior to such actual possession of such property by the carrier shall not be interpreted to vary this stipulation.

7. No carrier hereunder will carry, or be liable in any way for any documents, specie, or for any extraordinary value not specifically rated in the published classifications, unless a special agreement to do so, and a stipulated value of the articles are indorsed hereon.

8. Every party, whether principal or agent, shipping inflammable, explosive, or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense, or destroyed without compensation.

9. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the tariff rates and under the rules provided for by published classification.

10. If all or any of said property is carried by water, such water carriage shall be performed subject to statutory acts and to all the conditions, whether printed or written, contained in this bill of lading, including the condition that no carrier by

water shall be liable for any loss or damage resulting from explosion, accidents to boiler or machinery, or for any latent defects in hull, machinery, or appurtenances existing before, at the time, or after shipment, or sailing on the voyage, or unseaworthiness, provided the owners have exercised due diligence to make the vessel seaworthy; nor shall negligence be presumed against any carrier.

The carrier shall have the liberty to transfer, to tranship, to lighter, to call at any port or ports, to tow and to be towed, to deviate, to assist vessels in distress, to navigate without pilots, and to load and discharge goods at any time.

11. It is agreed that if any goods are sold short of ultimate destination each carrier that has completed its part of the transportation shall have earned its agreed-upon proportion of the through freight, and the same, with the charges advanced, shall be due and payable out of the proceeds thereof; and for any distance carried each carrier shall, on same basis, have earned and be entitled to freight, with charges advanced, for such part of the transportation as has been accomplished.

12. In case of quarantine the goods may be discharged at the risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations, or authorities, or for the carrier's dispatch, or at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when the goods are so discharged, or goods may be returned by carrier's at owner's risk and expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owner of the goods or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required by quarantine regulations or authorities, even though same may have been done by carrier's officers, crew, agents, or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

13. This contract is executed and accomplished, and all liability hereunder terminates upon delivery of said property to the exporting steamer, her master, agent, or servants, or to the exporting steamship company, or on the pier usually used by the exporting steamer at the said port (A), whether or not the same may be the property of or used as a warehouse by the inland carrier also, and the inland freight and all other hereinbefore provided for charges shall be a first lien, due and payable by the exporting steamer or exporting steamship company.

14. The terms and conditions of this bill of lading shall and do supersede and annul all previous agreements with respect to the service herein stipulated to be performed.

11. With respect to the service after delivery at the port (A) first above mentioned, and until delivery at the port (B) second above mentioned, it is agreed that:

1. The steamer shall have liberty to sail with or without pilots; that the carrier shall have liberty to convey goods in craft and for lighters to and from the steamer at the risk of the owners of the goods; and in case the steamer shall put into a port of refuge or be prevented, from any cause, from proceeding in the ordinary course of her voyage to tranship the goods to their destination by any other steamer; that the carrier shall not be liable for loss or damage occasioned by fire from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates, or robbers; by arrest or restraint of princes, rulers or people; riots, strikes, or a stoppage of labor; by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances, or unseaworthiness of the steamer, whether existing at the time of shipment or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy; by heating, frost, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, vermin, or by explosion of any of the goods, whether shipped with or without disclosure of their nature, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for inland damage; nor for obliteration, errors, insufficiency or absence of marks, numbers, address, or description; nor for risk of craft, hulk, or transshipment; nor for any loss or damage caused by the prolongation of the voyage, and that the carrier shall not be concluded as to correctness of statements herein of quality, quantity, gauge, contents, weight, and value.

General average payable according to York-Antwerp rules. If the owner of the steamer shall have exercised due diligence to make said steamer in all respects seaworthy and properly manned, equipped, and supplied, it is hereby agreed that in case of danger, damage, or disaster resulting from fault or negligence of the pilot, master, or crew in the navigation or management of the steamer, or from latent or other defects, or unseaworthiness of the steamer, whether existing at time of shipment or at beginning of voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in general average or for any special charges incurred, but, with shipowner, shall contribute in general average and shall pay such special charges, as if such danger, damage, or

disaster had not resulted from such fault, negligence, latent, or other defects or unseaworthiness.

2. That this shipment until delivery at the port (B) second above mentioned is subject to all the terms and provisions of and all the exemptions from liability contained in the act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An act relating to the navigation of vessels, etc."

3. That the value of each package receipted for as above does not exceed the sum of \$100, unless otherwise stated herein, on which basis the rate of freight is adjusted.

4. That the carrier shall not be liable for articles specified in section 4281 of the Revised Statutes of the United States unless written notice of the true character and value thereof is given at the time of lading and entered in the bill of lading.

5. That shippers shall be liable for any loss or damage to steamer or cargo caused by inflammable, explosive, or dangerous goods shipped without full disclosure of their nature, whether such shipper be principal or agent, and such goods may be thrown overboard or destroyed at any time without compensation.

6. That the carrier shall have a lien on the goods for all freights, primages, and charges, and also for all fines or damages which the steamer or cargo may incur or suffer by reason of the illegal, incorrect, or insufficient marking, numbering, or addressing of packages or description of their contents.

7. That in case the steamer shall be prevented from reaching her destination by quarantine, the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

8. That the steamer may commence discharging immediately on arrival and discharge continuously, any custom of the port to the contrary notwithstanding, the collector of the port being hereby authorized to grant a general order for discharge immediately on arrival, and if the goods be not taken from the steamer by the consignee directly they come to hand in discharging the steamer, the master or steamer's agent to be at liberty to enter and land the goods, or put them into craft, or store at the owner's risk and expense, when the goods shall be deemed delivered and steamer's responsibility ended, but the steamer and carrier to have a lien on such goods until payment of all costs and charges so incurred.

9. That if on a sale of the goods at destination for freight and charges the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

10. That full freight is payable on demand or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

11. That in the event of claims for short delivery when the steamer reaches her destination, the price shall be the market price at the port of destination on the day of the steamer's entry at the custom house, less all charges saved, steamer being responsible only for such part of the goods as have been actually delivered to the steamer at the port (A) first above mentioned, and steamer not liable for any loss or damage that may have occurred before such delivery, while agreeing to promptly present to inland carriers for account of owners of goods any claims for shortage or loss or damage that may have occurred before delivery of goods at the port (A) first above mentioned.

12. That merchandise on wharf awaiting shipment or delivery be at shipper's risk of loss or damage not happening through the fault or negligence of the owner, master, agent, or manager of the steamer, any custom of the port to the contrary notwithstanding.

13. That this bill of lading, duly indorsed, be given up to the steamer's consignee in exchange for delivery order.

14. That freight prepaid will not be returned, goods lost or not lost.

15. That parcels for different consignees collected or made up in single packages addressed to one consignee pay full freight on each parcel.

16. That freight payable on weight is to be paid on gross weight landed from ocean steamer, unless otherwise agreed to, or herein otherwise provided, or unless the carrier elects to take the freight on the bill of lading weight, but inland freight and charges paid on wheat, peas, maize, or other grain, or seed, or other bulk articles, from point of shipment to seaboard, shall be paid by consignee at destination on the weight delivered on board ocean steamer.

17. It is stipulated that in case the whole or any part of the articles specified herein be prevented by any cause from going in the first steamer leaving after the arrival of such articles at said port, the carrier is only bound to forward them by succeeding steamers employed in the steamship line, or if deemed necessary by said carrier, it may forward them in other steamers.

18. That the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bill of lading in use by the steamship company at time

of shipment and to all local rules and regulations at port of destination not expressly provided for by the clauses herein.

19. That if the goods are destined beyond the port (B) second above mentioned, the transshipment to connecting carrier shall be at the risk of the owner of the goods, but at steamer's expense, and that all liability of the steamship company hereunder terminates on due delivery to connecting carrier.

III. With respect to the service after delivery at the port (B) second above mentioned, and until delivery at ultimate destination, if destined beyond that port, it is agreed that—

1. In case the regular steamship service to final port of delivery should for any reason be suspended or interrupted, the carrier, at the option of the owner or consignee of the goods, or the holder of the bill of lading, may forward the goods to the nearest available port, this to be considered a final delivery; or to store them at the port (B) second above mentioned at the risk and expense of the owner of the goods until regular service to final port of destination is opened again.

2. That the property shall be subject exclusively to all the conditions of the carrier or carriers completing the transit; the duty of notification above provided for shall fall exclusively within the obligation of the carrier completing the transit, and no prior carrier shall be responsible for the fulfillment of that obligation.

And finally, in accepting this bill of lading, the shipper, owner, and consignee of the goods, and the holder of the bill of lading, agree to be bound by all of its stipulations, exceptions, and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee, or holder.

In witness whereof, the agent signing on behalf of the said The Western Railway of Alabama, and of the said exporting steamship company or exporting steamer and her owner, severally and not jointly, hath affirmed to only one bill of lading.

C. B. STRUKEY, *Agent*.

(On behalf of carriers severally, but not jointly.)

We hereby accept the conditions of the foregoing bill of lading and authorize the Western Railway of Alabama to furnish copy thereof to the central bureau in the city of New York.

W. V. WELCH & Co.,
Consignor (shipper).

(Stamp on face:) Railroad copy; not negotiable.



